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No. 93-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DEBORAH S. MARSHALL,

Petitioner,

v.

NELSON ELECTRIC, a unit of General Signal, and LUTHER NOAH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

SANDRA L. TOLLIVER*
Substitute Counsel for
MARY W. MORRIS, Deceased
MORRIS & MORRIS
1616 S. Denver Ave.
Tulsa, OK 74119
(918) 587-5514

Attorneys for Petitioner
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether a Title VII plaintiff's conduct in a sexually charged group environment bars a claim for hostile working environment sexual harassment based on unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by foreman in private.

II. Whether under Title VII of the Civil Rights Act of 1964, sexual harassment by a "foreman" can create liability on the part of an employer for a hostile working environment.

III. Whether the doctrine of the law of the case prevents a second judge in a single lawsuit from taking under advisement a statute of limitations defense presented on a repeated motion for summary judgment previously ruled on in a former motion for summary judgment in favor of the petitioner by the first judge, then inviting a motion for directed verdict on the same issue, and thereafter granting a direct verdict and a judgment notwithstanding the verdict.

IV. Whether the district court is required to follow the jury's factual findings when ruling on a Title VII case although a j.n.o.v. is later granted on the grounds that the case should not have gone to the jury.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals dated June 29, 1993, is unpublished and is reproduced in the Appendix (hereinafter "App.") at 1A-3A. The opinion of the United States District Court dated June 21, 1991, is reported at 766 F.Supp. 1018 (N.D. Okla.) and is reproduced in App. 4A-58A. The judgment of the United States District Court is dated June 21, 1991, and is reproduced in App. 59A.

JURISDICTION

On June 29, 1993, the United States Court of Appeals affirmed the District Court's judgment in favor of respondents Luther Noah and Nelson Electric on petitioner's intentional infliction of emotional distress claim and judgment in favor of respondent Nelson Electric on petitioner's Title VII claim.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On September 15, 1993, this Honorable Court granted petitioner an extension of time to file this Writ until October 27, 1993.

STATUTES

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer –

(1) to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

29 C.F.R. § 1604.11. Sexual harassment.

(a) Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with

an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(c) Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. . . .

STATEMENT OF THE CASE

Proceedings in the Courts below

Petitioner brought this action on September 12, 1988, against Nelson Electric ("Nelson") and Luther Noah ("Noah") after she had been laid off from Nelson, alleging violations of Title VII of the Civil Rights Act of 1964 and intentional infliction of emotional distress. Petitioner alleged that Noah, her foreman, created a hostile working environment for her by engaging in continued sexual harassment and that Nelson ignored and acquiesced in that harassment and later retaliated against her for complaining of harassment. Petitioner further alleged that the actions of Noah and Nelson constituted extreme and outrageous conduct which caused her severe emotional distress.

The case was originally assigned to Judge H. Dale Cook of the Northern District of Oklahoma. During the discovery period, on or about May 7, 1990, the case was

reassigned to Judge Layn Phillips of the Western District of Oklahoma, sitting as a visit Judge in the Northern District.

Judge Phillips allowed the respondents to file a fourth Motion for Partial Summary Judgment shortly before trial, asserting a repeated limitations defense as a bar to petitioner's state claim for intentional infliction of emotional distress, which defense had been overruled by Judge Cook in an earlier motion the previous year. The issue was simply whether the continuing tort doctrine extended the statute of limitations. Judge Phillips failed to completely dispose of the motion. Although he denied the motion, he took the issue under advisement and forced the parties to proceed with the jury trial.

The trial began on September 27, 1990. Petitioner presented her evidence on September 27th and 28th and on October 1st and 2nd, 1990. Respondents moved for directed verdict on the limitations issue at the close of the petitioner's case which the court took under advisement. The court then recessed for fourteen (14) days. Respondents began their cases on October 16, 1990, and concluded on October 19, 1990. Judge Phillips was still not prepared to rule on the limitations issue at the close of respondents' cases and continued to keep the issue under advisement even after the jury granted its award. Judge Phillips then invited J.N.O.V. Motions from the respondents on the same issue.

The jury awarded petitioner $2,500.00 in compensatory damages and $2,500.00 in punitive damages against Noah and $93,000.00 in compensatory damages and

$62,000.00 in punitive damages against Nelson on petitioner's claim for intentional infliction of emotional distress. On October 26, 1990, the court entered a partial judgment based on the jury award, continuing to keep under advisement respondents' Motion for Directed Verdict and the Title VII matter and later, respondents' Motions for J.N.O.V. Eight months later, June 21, 1991, the court granted respondents' Motions for Directed Verdict and Motions for J.N.O.V. on petitioner's intentional infliction of emotional distress claim, and entered judgment in favor of Noah and Nelson. The court also disregarded the jury's findings and entered judgment in favor of Nelson on petitioner's Title VII claim.

Jurisdiction of the district court arose from petitioner's claim brought pursuant to 42 U.S.C. § 2000(e)-5 and was founded on 28 U.S.C. § 1331. The district court had pendent jurisdiction to hear and decide petitioner's state law claim. The notice of appeal to the Tenth Circuit Court of Appeals was timely filed on July 19, 1991, pursuant to Fed. R. App. 4(a).

Facts

Petitioner began working in the manufacturing plant at Nelson on October 4, 1976, at the age of twenty. In her first eight years at Nelson, she was successful in obtaining raises and promotions. Petitioner was laid off several times and was familiar with the union procedures under the collective bargaining agreement. She began working under Noah in the Modification ("Mod") Center of Dept. 411 in 1984 after recall from a layoff. The Mod Center

also had constant noise from the surrounding work areas, making it difficult to hear what was said in the room. Noah's desk was in a corner, visible only from petitioner's work station. At the time petitioner began working under Noah, all four employees in the Mod Center were women, whom Noah referred to as his "little harem".

Noah would ask sexual questions of the women in group meetings. Noah listened in on the women's conversations and then asked them very personal questions. He rolled firestop putty into the shape of men's genitals and played with them in front of the women. He tried to look down the women's blouses. He purposely stood so close to the women that they would bump or rub against him when they stood up or walked by. In December 1985, Noah kept petitioner and a female co-worker in the Mod Center and would not let them leave until he kissed them.

Noah's conduct toward petitioner individually was much more explicit than his conduct toward the group. At Noah's desk, out of sight and hearing of the other women, Noah complained to petitioner that his wife was sexless and described his admiration for petitioner's youth and activity. He read sexual acts from the Bible to her to indicate that she should share her body with him. He showed her pornographic pictures from magazines and expressed his desire for her in certain sexual positions. He described how he wanted to sexually touch her with his hands, particularly like a doctor would do in an examination. He questioned her about her sexual activities with her husband. He touched her on the breast and

rubbed a ruler between her legs. He even grabbed at her crotch as witnessed by a co-worker.

Nelson admitted that it had no written policy against sexual harassment and no written complaint procedure for its employees to follow. Petitioner complained about Noah's behavior first to Noah himself, then to her lead person, Juanita Holloman, and then finally to the union steward, John Fitzgerald. On June 30, 1986, Fitzgerald told her that he had spoken with Bill Coleman, Human Resources Manager, and that Coleman would take care of the matter with Noah. Coleman never went to the Mod Center to investigate petitioner's complaints; nor did he ask any of the other women in the Mod Center if they knew what Noah was doing. Noah stopped his conduct for a little while, but then continued his pursuit of petitioner more aggressively and explicitly. Noah threatened on several occasions that he would lay off petitioner if she did not succumb to his sexual demands.

On August 8, 1986, petitioner argued with Noah when he insisted that she meet him away from work to have sex with him. Noah laid her off the next work day in retaliation. She bumped to another department at Nelson, Dept. 710, and took a cut in pay. Noah still harassed her in her new department. He wiggled his tongue at her sexually, tried to touch her, stared at her from the overhead stairs, called her foreman to ask about her, and pinched her on the arm real hard.

Noah used employees on loan from other departments to perform the work previously done by petitioner. On September 18, 1986, petitioner filed a union grievance regarding loaners working her job. She was told by the

union steward that sexual harassment could not be included in the grievance because it was not a proper subject of a union grievance. Nelson denied the grievance.

Due to Noah's continued harassment and the denial of her grievance, on October 16, 1986, petitioner wrote a letter to the President of Nelson, Ivan Ellsworth, setting forth the details of Noah's harassment. She supplemented the letter at the request of Bill Coleman. Although an investigation was conducted and Noah was told not to return to work, she did not get her former job back.

In March 1987, petitioner filed another grievance because she had not been recalled to her home department. In April 1987, the Dept. 411 foreman, told her that she would never be allowed back in Dept. 411 because she had filed a harassment complaint against Noah. Another employee was placed in Dept. 411 after petitioner filed a grievance. Petitioner took a voluntary layoff from Dept. 710 in June of 1987, and bumped back into Dept. 411. She bumped an employee, who continued to work in the Mod Center after being bumped by her. Within two weeks both she and the other employee were laid off for "lack of work." Contrary to the "lack of work" claim in Dept. 411, another employee took petitioner's place in Dept. 411 working as a Dept. 311 employee on loan to Dept. 411. Petitioner chose not to bump into another department and left Nelson.

ARGUMENT

A. INTRODUCTION

A hostile working environment was established as an actionable form of sexual harassment by this Court in 1986. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). While there have been many district court and court of appeals opinions on this cause of action, the courts have not ruled consistently with each other or with the EEOC Guidelines. Definitive law is needed to establish the essential elements of the cause of action, the parameters of a defense and the extent of any employer's liability. This Honorable Court should grant certiorari to clarify the ruling in *Meritor Savings Bank, supra,* with respect to what conduct by a Title VII plaintiff bars recovery for a hostile working environment claim and with respect to an employer's liability for the acts of a foreman.

This Honorable Court should also grant certiorari with respect to the doctrine of the law of the case and the Seventh Amendment protection governing jury's factual findings.

B. WHETHER A TITLE VII PLAINTIFF'S CONDUCT IN A SEXUALLY CHARGED GROUP ENVIRONMENT BARS A CLAIM FOR HOSTILE WORKING ENVIRONMENT SEXUAL HARASSMENT BASED ON UNWELCOME SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, AND OTHER VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE BY FOREMAN IN PRIVATE.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against an

individual with respect to conditions of employment because of the individual's sex. 42 U.S.C. § 2000e-2. This Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) established the claim for "hostile environment" sexual harassment as a form of sex discrimination actionable under Title VII of the Civil Rights Act. The EEOC Guidelines state that sexual harassment arises when unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature create a hostile working environment. 29 C.F.R. § 1604.11.

Harassment can be made a condition of employment due to the pervasiveness of the harassment. Frequency of harassing comments is pertinent as to whether a hostile working environment has been created. *See Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *Ellison v. Best Foods*, 598 F. Supp. 159 (E.D. Ark. 1984). Repeated demeaning and offensive comments have the effect of altering the conditions of employment within the meaning of Title VII. *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984).

> Continuous abusive language, whether racist, sexist, or religious in form, can often pollute a healthy working environment by making an employee feel uncomfortable or unwanted in his surroundings. In more extreme cases such as this one, it can even severely affect the employee's emotional and psychological stability.

Id. at 1057.

Petitioner testified that Noah would call her up to his desk and show her pornographic pictures, read sexual

acts from the Bible to her, comment about her body, tell her that he would like to do specific sexual things to her because she was young, strong and very active, ask her what sexual acts and positions she liked, told her to do specific things to her husband and to ask her husband to do specific things to her, touch her breasts and crotch and rub a ruler between her legs, and pressured her to begin a sexual relationship with him. These comments, advances, solicitations, and touchings were personal and directed to petitioner primarily in private. Petitioner did not welcome the comments, advances, solicitations and touchings by Noah and found them offensive. Despite such testimony, the district court found that the sexual harassment was not a condition of petitioner's employment because of her participation in group activity wherein sex was discussed or sexual jokes were told.

In *Meritor Savings Bank, supra,* this Honorable Court ruled that voluntary participation did not determine whether alleged harassment was welcome. The respondent therein engaged in sexual intercourse with her manager over fear of losing her job. She alleged that she had been constantly subjected to sexual harassment over a four year period, which included her manager fondling her in front of other employees, following her into the women's restroom, and even forcibly raping her. The Supreme Court stated:

> [T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual

> advances were 'unwelcome.' 29 C.F.R. § 1604.11(a) (1985) . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

Meritor Savings Bank, 477 U.S. at 68. However, the Court also held that the respondent's sexually provocative speech and dress was relevant in determining whether she found particular sexual advances unwelcome. *Id.* at 69.

> Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," which the District Court apparently admitted into evidence, "had no place in this litigation." The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome.

Id. at 68-69 (citations omitted).

In 1985, the EEOC Guidelines stated that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole," and the "totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b) (1985). The Sixth Circuit followed those guidelines in *Rabidue v. Oscela Refining Co.*, 805 F.2d 611, 620-621 (6th Cir. 1986) by finding that the trial court

should consider the totality of the physical environment of plaintiff's work area and the lexicon of obscenity that pervaded the environment.

The EEOC has since taken the position that a plaintiff's use of sexual terms or off-color jokes does not excuse more extreme and abusive or persistent comments or a physical assault. *EEOC: Guidance on Sexual Harassment,* March 19, 1990, [Fair Employment Practices Manual] 8 LAB. REL. REP. 405:6681 (BNA). Further, the conduct of the plaintiff that is offered by the defendant to show "welcomeness" must relate to the harasser. *Id.*

The court of appeals' opinion since the *Meritor Savings Bank* decision, have held that use of foul language or sexual innuendo does not waive one's legal protection against unwelcome harassment. See *Swentek v. USAir, Inc.,* 830 F.2d 552 (4th Cir. 1987). In *Wyerick v. Bayou Steel Corp.,* 887 F.2d 1271 (5th Cir. 1989), the plaintiff complained of highly personalized lewd statements and gestures. The plaintiff made sexual comments in reply to the sexual remarks and gestures. The court held that the plaintiff's infrequent replies would not bar her claim. The court went on to state that any finding by the district court that the plaintiff was barred as a matter of law from maintaining a claim for a hostile environment because her work atmosphere, as a whole, was heavily charged with sexual comments and gestures, was error because work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory. *Id.* at 1275.

Herein, respondents tried to show that petitioner's conduct among the group of women proves that Noah's

conduct to her individually was not offensive to her. Petitioner was not complaining about the sexual talk among the women. She was complaining of the direct solicitations and comments made to her privately by Noah. The Court must recognize that the responses of a sexual harassment victim may not be overt and obvious to everyone in the department.

> The response of the harassed employee may range from overt rejection to complete acquiescence, depending on factors such as how much she needs the job, her socialized perception of her role as a woman and place in the workforce, and fear of retribution.

A. Conte, *Sexual Harassment in the Workplace: Law and Practice* (1990). The proper inquiry is whether petitioner welcomed the particular conduct in question from the alleged harasser. *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

This Court is requested to grant certiorari to delineate under what circumstances the conduct of a sexual harassment victim and the type of working environment in which the harassment took place would defeat a claim for hostile working environment.

C. WHETHER UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, SEXUAL HARASSMENT BY A "FOREMAN" CAN CREATE LIABILITY ON THE PART OF AN EMPLOYER FOR A HOSTILE WORKING ENVIRONMENT.

The EEOC Guidelines state that an employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. . . . 29 C.F.R. § 1604.11. This Court in *Meritor Savings Bank, supra,* chose not to adopt the EEOC Guidelines. The Guidelines are an administrative interpretation of Title VII of the Civil Rights Act of 1964 by the enforcing agency, and are entitled to great deference. See *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971). While they constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance," they are not controlling authority on the courts. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976) quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

The Court in *Meritor Savings Bank, supra,* did not issue a definitive rule on employer's liability for sexual harassment. The Court agreed with the EEOC that Congress wanted courts to look to agency principles for guidance, but refused to impose absolute liability on employers for the acts of their supervisors.

> We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress

> wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

Meritor Savings Bank, 477 U.S. at 72.

Title VII and the EEOC Guidelines do not define "supervisor." Under agency principles if an employer includes any agent and if a foreman is responsible for the work environment, then the foreman should be considered a supervisor for Title VII purposes for whose acts an employer may be liable. In a concurring opinion, Justice Marshall stated:

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace.

Meritor Savings Bank, 477 U.S. at 76 (Marshall, J. concurring). An employer's liability for the acts of its employees under agency principles should not be defeated by the lack of "supervisor" title.

The district court herein ignored the testimony of John Bell, manufacturing and production manager and Noah's supervisor, who stated that Noah was petitioner's "direct supervisor," the testimony of Harold Wallace, a

Nelson employee for fifteen (15) years, who described Noah's position of foreman as one of "total control" over his area, which included "discretion to hire and fire," and the testimony of Jerry Holloman, Shop Manager, who stated that a foreman had the responsibility to choose which classification to layoff within his department, and found that Noah was not a supervisory employee.

The trial court also found that Nelson was not liable for Noah's harassment because he was acting outside the scope of his employment. An employer is liable for harassment by a supervisor if the employer becomes aware of it and does nothing to stop it because by acquiescing, the employer has brought the supervisor's actions within the scope of his employment. *EEOC: Guidance on Sexual Harassment,* March 19, 1990, [Fair Employment Practices Manual] 8 LAB. REL. REP 405:6681 (BNA). Further, an employer is liable for a supervisor's actions if these actions represent the exercise of apparent authority.

> The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management. This apparent authority of supervisors arises from their power over their employees, including the power to make or substantially influence hiring, firing, promotion and compensation decisions. A supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer, and he may rely upon apparent

> authority to force an employee to endure a harassing environment for fear of retaliation.

Id.

At least one court of appeals has found to the contrary. Following *Meritor Savings Bank, supra,* the Tenth Circuit determined that an employer is liable when the harassment is within the scope of the supervisor's employment, and noted this situation is unlikely to occur because " '[sexual harassment] simply is not within the job description of any supervisor or any other worker in a reputable business.' " *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1417-18 (1987).

Other courts have ruled differently. In *Shrout v. Clawson,* 689 F.Supp. 744 (S.D. Ohio 1988), the plaintiff was subjected to specific instances of sexual harassment when her supervisor withheld annual performance evaluations and sales reviews after she refused his sexual advances. She brought an action against her employer for harassment, Title VII violations and intentional infliction of emotional distress under both agency and strict liability principles.

Similarly, in *Howard University v. Best,* 484 A.2d 958 (D.C. App. 1984), the incidents of alleged sexual harassment occurred during faculty, administrative or other professional meetings attended by the parties in their professional capacities. The court held that the university was subject to liability for any sexual harassment committed by a dean against a faculty member, because the conduct "was foreseeable as being within the range of responsibilities entrusted to the employee." *Id.* at 987. In *Sparks v. Pilot Freight Carriers,* 830 F.2d 1554 (11th Cir. 1987), the court found that the supervisor had used his

authority to facilitate his harassment of the plaintiff by repeatedly reminding her that he could fire her if she refused to comply with his advances.

This Court should accept certiorari to establish a definite rule on employer liability for harassment by its employees who have supervisory functions.

D. WHETHER THE DOCTRINE OF THE LAW OF THE CASE PREVENTS A SECOND JUDGE IN A SINGLE LAWSUIT FROM TAKING UNDER ADVISEMENT A STATUTE OF LIMITATIONS DEFENSE PRESENTED ON A REPEATED MOTION FOR SUMMARY JUDGMENT PREVIOUSLY RULED ON IN A FORMER MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE PETITIONER BY THE FIRST JUDGE, THEN INVITING A MOTION FOR DIRECTED VERDICT ON THE SAME ISSUE, AND THEREAFTER GRANTING A DIRECTED VERDICT AND A JUDGMENT NOTWITHSTANDING THE VERDICT.

The doctrine of the "law of the case" concerns the continued application of a rule of law previously determined in the same case. *In re: Staff Mortgage & Investment Corp.*, 625 F.2d 281 (9th Cir. 1980). The purpose of the doctrine of the law of the case is to protect settled expectations of the parties, ensure uniformity of decisions, and promote judicial efficiency. *Little Earth of the United Tribes, Inc. v. U.S. Dept. of Housing*, 807 F.2d 1433 (8th Cir. 1986). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit." *Erie Conduit Corp. v. Metropolitan Asphalt Paving*, 560 F.Supp. 305,

307 (E.D.N.Y. 1983). The rules reflect the respect one judge owes another in the same case. *Id.*

> Adherence to law of the case principles is even more important in this context where the transferor judge and the transferee judge are not members of the same court. Here, the principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority.

Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3rd Cir. 1982).

In ruling on a motion for summary judgment, the trial court's discussion of the applicable law becomes the law of the case. *Eastern Tunneling Corp. v. Southgate Sanitation District*, 487 F.Supp. 109 (D. Colo. 1980). The ruling on a motion for partial summary judgment is the law of the case on the issues decided therein. *United States v. Horton*, 622 F.2d 144 (1st Cir. 1980). Denial of a summary judgment does not preclude directed verdict. In *Sandoval v. United States Smelting, Refining & Mining Co.*, 544 F.2d 463, 464 (10th Cir. 1976):

> "Appellant here contends the trial court erred by granting a directed verdict when it had earlier denied appellee's motion for summary judgment. She argues that since evidence garnered at the discovery stage was virtually identical to that introduced at trial, the court's directed verdict, when summary judgment was previously denied, was improper. However, a denial of summary judgment does not rule out the possibility of a directed verdict." (citations omitted).

Accord, The Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1502 (10th Cir. 1983)."

A trial judge retains at all times the power to re-examine and if necessary alter a previous ruling in order to avoid perpetuation of error. *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), and *Messenger v. Anderson*, 225 U.S. 436 (1912). A decision of law in a case, once made, however, should not be changed absent clear error in the original ruling or a change in circumstances. *United States v. Estrada-Lucas*, 651 F.2d 1261 (9th Cir. 1980). The clearly erroneous test is very stringent and applies only in exceptional circumstances. *Dept. of Natural Resources v. United States*, 1 Cl. Ct. 727 (1983). A judge must follow a previous decision on the same issue in the same case unless "unusual circumstances" exist that permit a different conclusion. *Hayman Cash Register Co., supra* at 169.

Nelson filed its first Motion for Partial Summary Judgment on March 1, 1989, alleging in part that petitioner's claim for intentional infliction of emotional distress was barred by the statute of limitations. Magistrate Wolfe heard the motion and filed his Report and Recommendation on May 23, 1989, denying Nelson's Motion in total. Nelson filed its objections to the Report and Recommendation, but Judge Cook affirmed the Magistrate's ruling and adopted the Magistrate's recommendation with regard to Nelson's Motion for Partial Summary Judgment as the Order of the Court which was entered on October 11, 1989.

After this case was reassigned, Judge Phillips allowed Nelson to file its Fourth Motion for Partial Summary Judgment in July 1990, only two (2) months prior to trial, alleging again that petitioner's claim for intentional infliction of emotional distress was barred by the statute of limitations. Judge Phillips denied the motion "based on the previous rulings of other judges in the Northern District and the existence of factual disputes," but kept the limitations issue under advisement by stating in his order entered August 6, 1990, that he would "carefully monitor the evidence supporting this claim at trial." He allowed the case to proceed through a two (2) week trial, wherein no new evidence on this issue was presented, then invited motions for directed verdict and motions for j.n.o.v., and then eight (8) months later, entered his order granting respondents' motions.

The Court should accept certiorari to decide whether the doctrine of the law of the case prevents a second judge in the same case from considering a limitations defense, after the first judge had overruled the defense, and then granting a directed verdict and/or a j.n.o.v. on the limitations issue in defendant's favor without any new facts or change in the law.

E. WHETHER THE DISTRICT COURT IS REQUIRED TO FOLLOW THE JURY'S FACTUAL FINDINGS WHEN RULING ON A TITLE VII CASE ALTHOUGH A J.N.O.V. IS LATER GRANTED ON THE GROUNDS THAT THE CASE SHOULD NOT HAVE GONE TO THE JURY.

Petitioner brought a claim arising under Title VII for sexual harassment and retaliatory layoff and a claim arising under the law of the State of Oklahoma for intentional infliction of emotional distress. The jury found that within the two (2) year period preceding the filing of this action, Nelson took outrageous actions against Petitioner, separate and independent of Noah's harassment, which caused her severe emotional distress. The jury found that Nelson ignored the conduct of Noah after it knew or should have known of Noah's sexual harassment. The jury also found that the loaning of employees into Dept. 411, petitioner's layoff from Dept. 411 in July 1987, employment of other individuals in Dept. 411 after September 12, 1986, the conduct of the Dept. 411 foreman in March or April 1987, Nelson's conduct after September 12, 1986, particularly Nelson's actions inconsistent with documented procedures for layoffs, bump rights, and recall rights, were outrageous and caused petitioner severe emotional distress.

In a case where the trial is both to the court and to the jury, any essential factual issues central to both trials must be tried first to the jury with the jury's findings binding on all common issues. *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988). It would be a violation of the Seventh Amendment right to a jury trial for the

trial court to disregard a jury's finding of fact. *Floyd v. Laws,* 929 F.2d 1390 (9th Cir. 1991). The trial court is required by the Seventh Amendment to follow the jury's explicit or implicit factual determinations when the trial court resolves the equitable claim. *Miller v. Fairchild Industries, Inc.,* 885 F.2d 498 (9th Cir. 1989)

Factual issues central to an emotional distress claim are similar to the factual issues in a Title VII claim, but the court's opinions are not clear as to how identical the issues have to be in order for the jury's factual findings to be binding on the trial court. In *Baker v. Weyerhaeuser Co.,* 903 F.2d 1342, 1345 (10th Cir. 1990), the court said:

> Weyerhaeuser argues that the district court's finding in the Title VII action did not have to be in accord with the district court's understanding of the general verdict returned by the jury since the essential elements of the Title VII claim were not the same as the essential elements in the present claim. Be that as it may, we do not regard the district judge's comment to indicate that he was "bound" to follow his understanding of the jury's verdict.

See also Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013-14 (6th Cir. 1987) (jury verdict on § 1983 claim does not have binding effect upon Title VII issues due to different standards on employer liability for employees' acts); *Lincoln v. Board of Regents of the University System of Georgia,* 697 F.2d 928, 935, n. 6 (11th Cir. 1983), cert. denied 464 U.S. 826 (Section 1981 jury verdict would not have binding effect upon Title VII issues if § 1981 liability based upon disparate impact rather than disparate treatment).

The trial court's factual findings on petitioner's Title VII claim were inconsistent with the jury's findings of fact. The court took the position that it did not have to conform its findings to those of the jury because the state claim should not have been submitted to the jury in the first place, thereby making the jury's findings "infirm".

This Honorable Court should decide if a jury's findings are infirm because the trial court decided after the fact that the case should not have gone to the jury based on the statute of limitations. The case of *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) refers to a jury verdict being "infirm" when the verdict has been set aside as against the clear weight of the evidence. Hence, where the jury verdict was not held by the trial court to be against the weight of the evidence, but was set aside because the court found that the cause of action was barred by the statute of limitations, the factual findings on the common issues may still be valid.

In *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550 (11th Cir. 1988), the trial court granted j.n.o.v. in favor of the defendants, but then specified that if the jury verdict was allowed to stand, that the court would grant certain damages and not others. The 11th Circuit held that the determination of damages was purely academic when made because, at the time, the court had set aside the liability verdict. *Id.* at 1560. Similarly, in *O'Neill v. United States*, 411 F.2d 139 (3rd Cir. 1969), the district court entered judgment in favor of the defendants, then assessed the plaintiff's damages in a sum certain. When the appellate court vacated the judgment and remanded the case, a new finding on damages was to be made because the

assessment of damages was subsequent to the decision where there was no liability. *Id.* at 146.

The policy behind ordering a new trial on damages as well as liability is to protect against unfairness in the determination of damages when the determination had no legal effect. "It is not sound judicial policy to let a damage finding stand which, in the contemplation of the jury making it, is divorced from practical effect." *Romer v. Baldwin*, 317 F.2d 919 (3rd Cir. 1963). Where there was no risk of unfairness on the party of the jury in making its factual findings with regard to liability and in determining the amount of Plaintiff's damages, the jury's findings should be binding.

CONCLUSION

This Honorable Court is respectfully petitioned to further define the rights of a Title VII plaintiff to make a claim for hostile working environment sexual harassment without her own conduct barring a claim. The Court is requested to find that petitioner's own conduct in the group setting did not bar her claim of sexual harassment for her foreman's conduct in private and remand the case to the district court. The Court is further petitioned to adopt a rule of employer liability for sexual harassment by a foreman with supervisory responsibilities and find that respondent Nelson was liable for the sexual harassment of petitioner by respondent Noah and remand the case to the district court.

The Court is petitioned to apply the doctrine of the law of the case to the decision of the first judge in

overruling a statute of limitations defense so that the issue of law was established as the law of the case which could not be reversed by the second judge in the case without a clear showing of error or change in circumstances. The Court is requested to find that the granting of the j.n.o.v. was in error and should be reversed and the jury verdict reinstated.

The Court is petitioned to apply the Seventh Amendment to a Title VII case being tried with a state claim and hold that the district court is bound by the jury's findings on the factual issues central to the Title VII claim.

Respectfully submitted,

SANDRA L. TOLLIVER*
Substitute Counsel for
MARY W. MORRIS, Deceased,
MORRIS & MORRIS
1616 S. Denver Ave.
Tulsa, Oklahoma 74119
(918) 587-5514

Attorneys for Petitioner
*Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEBORAH S. MARSHALL, Plaintiff-Appellant, v. NELSON ELECTRIC, a Unit of General Signal; LUTHER NOAH, and DOES I-X, inclusive, Defendants-Appellees.	)	No. 91-5114 (D.C. No. 88-C-1213-P) (N.D. Okla.)
DEBORAH S. MARSHALL, Plaintiff-Appellee, v. NELSON ELECTRIC, a Unit of General Signal, Defendant-Appellant, and LUTHER NOAH and DOES I-X, inclusive, Defendants.	)	No. 91-5123 (D.C. No. 88-C-1213-C) (N.D. Okla.)

ORDER AND JUDGMENT*
(Filed June 29, 1993)

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before SEYMOUR and TACHA, Circuit Judges, and ROGERS,** Senior District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Plaintiff Deborah Marshall appeals from a judgment entered in favor of defendants in this hostile environment Title VII action. Following a two-week trial, the jury found in favor of plaintiff on her state law claim for intentional infliction of emotional distress. The court took under advisement a statute of limitations question regarding that claim, as well as the Title VII matter. The court ultimately issued an order granting defendants' motion for judgment notwithstanding the verdict on the state claim and ruling in favor of defendant Nelson Electric Company on the Title VII question. *See Marshall v. Nelson Elec., a Unit of Gen. Signal,* 766 F. Supp. 1018 (N.D. Okla. 1991). This appeal followed. Defendant Nelson Electric filed a cross-appeal. We affirm.

Plaintiff makes four arguments in this appeal. They are 1) that the district court erred in concluding, as a matter of law, that her emotional distress claim is barred

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**Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

under the applicable statute of limitations,[1] 2) that the district court's factual findings are clearly erroneous, 3) that the trial court erred in conditionally granting defendants' motion for new trial, and 4) that the court's ruling on the Title VII claim was in error.

We have carefully reviewed the appendices which the parties have submitted. We have also conducted an exhaustive review of the pertinent authorities. We conclude that the district court's disposition was correct, and we therefore affirm for substantially the reasons set forth in that court's lengthy and well-reasoned opinion. In light of this disposition, we need not reach the issues raised in the cross-appeal.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

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[1] In connection with this issue, plaintiff contends the trial court erred in granting j.n.o.v. on the statute of limitations claim after the court previously denied defendants' motion for summary judgment on this issue. We have specifically held, however, that the denial of summary judgment does not rule out the possibility of a directed verdict. *See Catts Co. v. Gulf Ins. Co.*, 723 F.2d 1494, 1502 (10th Cir. 1983).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH S. MARSHALL, Plaintiff,	)	No. 88-C-1213-P
v.	)	
NELSON ELECTRIC, a Unit of General Signal, et al., Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTIONS FOR JNOV ON THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS JURY CLAIM, FINDINGS OF FACT AND CONCLUSIONS OF LAW ON TITLE VII NON-JURY CLAIM, AND JUDGMENT

(Filed June 21, 1991)

I. INTRODUCTION

Plaintiff, Deborah Marshall ("Marshall"), after being laid off by her employer, Nelson Electric, filed the instant action alleging violation of Title VII of the Civil Rights Act of 1964, and intentional infliction of emotional distress. Defendants are Nelson Electric and Luther Noah ("Noah").

Marshall alleged Noah, an employee of Nelson Electric who served as a foreman during most of Marshall's tenure there, engaged in continued sexual harassment at the workplace, and further alleged Nelson Electric ignored and acquiesced in that harassment. Marshall also alleged defendants retaliated against her because she refused to succumb to this harassment. Marshall alleged these actions constituted extreme and outrageous conduct

which caused her to suffer severe physical and emotional distress.

Defendants denied Marshall's claims and asserted Marshall initiated and participated in much of the sexually-related conduct which occurred at the workplace. Defendants further asserted Marshall's layoff was not in retaliation for her actions but rather was a result of a significant economic downturn at the Tulsa location. Finally, defendants denied that any physical or emotional distress suffered by Marshall was due to any conduct of the defendants, but rather was due to conditions unrelated to Marshall's employment at Nelson Electric, including but not limited to Marshall's prior suicide attempt, physical abuse she was suffering at the hands of her husband, an extramarital affair she was having while employed at Nelson Electric, and other factors.

The intentional infliction of emotional distress claim was determined by the jury. The Title VII claim against Nelson Electric was tried to the Court. Although both claims were tried simultaneously, the Court heard some brief testimony outside the presence of the jury which pertained only to the Title VII claim.[1] At the conclusion of

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[1] This testimony related to the arbitration hearing. The Arbitrator's Decision and Award contains the following pertinent findings:

> Finally, I find that there is not sufficient evidence in the record to show that sexual harassment on the part of Grievant's Supervisor played a role in selecting her for layoff. I further find that there was an admitted economic reason which justified the Company's decision to call a layoff, and because it appears that Grievant has the low seniority among Electricians in the

the evidence, both defendants moved for a directed verdict. The Court took these motions under advisement. On the intentional infliction of emotional distress claim, the jury awarded Marshall $2,500 compensatory damages against Noah, $93,000 compensatory damages against Nelson Electric, $2,500 punitive damages against Noah, and $62,000 punitive damages against Nelson Electric. The Court entered a partial judgment based on the jury award on October 26, 1990, and took the Title VII matter under advisement. Both defendants subsequently filed motions for judgment notwithstanding the verdict ("jnov") on the intentional infliction of emotional distress claim and filed proposed findings of fact and conclusions of law on the Title VII claim. Marshall filed a brief in opposition to defendants' motions for jnov on the emotional distress claim, and also filed proposed findings of fact and conclusions of law on the Title VII claim.

The Court grants the defendants' motions for directed verdict and jnov on the emotional distress claim, finds in favor of Nelson Electric on the Title VII claim, and renders judgment in favor of defendants.

II. WITNESSES AND EXHIBITS

Marshall called the following witnesses at trial: Tom Birmingham, John Bell, George T. (Terry) Camp, Bill

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Department, I conclude that sufficient neutral reasons have been shown to explain her selection for layoff. There is no evidence at all to show Grievant was laid off for complaining to the Company about being sexually harassed. I conclude that Grievant was not improperly laid off on August 15, 1986.

See Defendant's Exhibit 18.

Coday, Bill Coleman, John Edwards, Randy Edwards, John Fitzgerald, Thomas Goodman, M.D., Jerry Holloman, Juanita Holloman, Jackie Howell, David Huettner, Ph.D., Charles Marshall, Deborah Marshall, Metta McGee (by deposition), Luther Noah, Wayne Schnee, Harold Wallace, and Vicki Williams.

Defendants called the following witnesses at trial: Dr. Jan Capehart, Dr. William Chop, Billy G. Coleman, Randy L. Edwards, Patricia A. McDannald, Luther Noah, Doris W. Skock, and Edward M. Wall.

The Court received into evidence numerous exhibits at trial, introduced by both plaintiff and defendant. The Court's rulings on the offer of these documentary exhibits are reflected in the trial transcript.

III. STIPULATIONS

The parties entered into the following factual stipulations:

1. Plaintiff was employed at Nelson Electric from October 4, 1976 until July 2, 1987.

2. On August 16, 1986, plaintiff was laid off from Department 411 and chose to bump into Department 710.

3. Luther Noah's employment with Nelson Electric ceased as of November 1, 1986.

4. On June 15, 1987, plaintiff voluntarily chose to be laid off from Department 710 and chose to bump into Department 411.

5. Effective July 2, 1987, plaintiff and Jackie Howell were laid off from Department 411.

6. Plaintiff filed a formal complaint of sexual harassment with the Oklahoma Human Rights Commission on December 16, 1987.

7. On September 12, 1988, plaintiff filed this lawsuit.

See Jury Instruction No. 3 (Oct. 18, 1990). The Court adopts these stipulations.

IV. SUMMARY OF KEY TESTIMONY

Although numerous witnesses testified in this matter, the following testimony is pertinent to the pending motions for jnov and provides an overview of the allegations advanced by both sides.

Marshall testified that during her tenure at Nelson Electric, Noah embarked on a course of conduct that constituted sexual harassment. Marshall testified Noah referred to the women who worked for him as his "little harem"; asked Marshall if her jeans rubbed her crotch and made it wet; asked her how far or deep a man could "go inside" her; stated he wanted to marry her, wanted her to lay around the house naked and put his face in her "snatch"; and quoted repeatedly from the Bible in a way that suggested it was proper for Noah to have sex with her. He also allegedly told her that he would be very "gentle" with her and cause her to have multiple orgasms.

Marshall further testified Noah physically touched her in a variety of ways; grabbed at her; deliberately

bumped into her rear and breasts; sneaked up behind her when she was bent over; and showed her pictures from Penthouse magazine. She described one occasion at work when Noah touched her between the legs and on the breast and then claimed "the devil made me do it." She also described several occasions when Noah fashioned male penises out of putty, put them in his pants, and pranced around the work area. He also allegedly threatened her job if she did not "meet with him in private." Marshall testified she never succumbed to these advances.

On cross-examination, Marshall acknowledged she also used "dirty talk" in the workplace; admitted from time to time she had asked others at work whether they had sex the night before; admitted she did not mention sexual harassment in the union grievance she pursued in connection with her layoff; conceded she was involved in an incident when Noah's pants were pulled down at work; and acknowledged that despite this alleged harassment at the hands of Noah, she repeatedly contacted Nelson Electric management after her transfer to another department asking to be transferred back into Noah's department and placed under his supervision.

One of the key witnesses called by the defense was Dr. William Chop, Marshall's treating physician. Psychiatry is an integral part of Chop's practice. Unlike other expert witnesses specifically retained to render opinions for this litigation, Chop began treating Marshall before the lawyers on both sides of this lawsuit arrived on the scene. Chop, however, was not called as a witness by Marshall. Instead, Chop was called as a defense witness by Nelson Electric.

Chop began treating Marshall on January 14, 1988, for pain, numbness and physical complaints. He last saw her on March 29, 1988. Despite the fact that Chop treated Marshall for two months, absent from Chop's testimony and medical records is any prelitigation reference by Marshall to *sexual* harassment at her workplace. Instead, Marshall blamed her symptoms on a workrelated injury that occurred in March of 1987. According to Chop, Marshall specifically attributed her weight gain problem to the worker's compensation accident. She also related to Chop a suicide attempt which resulted from her husband beating her. In Chop's opinion, it was "almost impossible" to determine the source of Marshall's many problems, including depression. Chop testified that sexual harassment was an unlikely cause of Marshall's emotional problems.

Nelson Electric's exhibit 54 contains Dr. Chop's notes, as well as several other papers. The third page of the exhibit, bearing a page no. of 499, contains Chop's notes of the oral history given by Marshall to Chop during Marshall's initial visit. There is no reference to any sexual harassment. It states in part:

> Patient presents with long, somewhat vague history of ten months of problems with pain in her neck, back and numbness extending into the arms and the hands with a very worried affect about this . . . She has had a normal EMG on the left upper extremity where she has experienced most of her numbness and shooting pain a month after the initial work accident which occurred 3/2/87, where she was spun around by a machine . . .

The next page of exhibit 54, bearing page no. 500, contains Chop's notes regarding Marshall's visit of January 27, 1988. There is no reference to harassment. There is mention, however, of Marshall's suicide gesture, which Chop described in part as follows:

> In addition, patient has transverse scars on the left wrist from a suicidal gesture about ten to 15 years ago that resulted when her husband was beating her quite a bit.

Dr. Chop also noted that Marshall had a "[h]istory of being abused by her current husband." The notes regarding Marshall's visits of February 25, 1988, and March 29, 1988, are shown on pages 503 and 504 of the exhibit. There is no reference to any harassment. The only reference to any harassment in the entire exhibit is contained on pages 505-506 which is the note Marshall gave to Chop on April 5, 1988. The note, which was written for litigation purposes, states in part:

> Dr. Chop my lawyer needs a copy from you, & I am also getting one from my pshyc., Dr. Farley. He needs the date in Jan. that I first came in and put me on med. & referred me to pshyc.
>
> 1. Date in Jan. temporarily disabled to work due to harassment from work &/or injury.
>
> * * *
>
> My lawyer is putting me back on drawing workman's comp. again & making them pay for my pshyco. but he also needs the copy from you that started temp. disabled to work starting Jan . . .

during his testimony, Chop discussed this note and his refusal to provide Marshall's attorney the information

requested by Marshall because, according to Chop, he "wasn't willing to try to make this appear to be a work-related injury."

Nelson Electric's exhibit 55 contains eleven pages in Marshall's handwriting, explaining her problems. There is no reference in the exhibit to any alleged harassment. Marshall admitted during her cross-examination that she prepared this document for Dr. Chop to describe the pain that she was suffering.

V. THE JURY'S VERDICT AND ANSWERS TO SPECIAL INTERROGATORIES

The jury was given the following instructions concerning the intentional infliction of emotional distress claim:

> **Elements of Liability – Intentional Infliction of Emotional Distress**
>
> For the plaintiff, Deborah Marshall, to recover from the defendants Nelson Electric and Luther Noah on plaintiff's claim of emotional distress, you must find that plaintiff has established by a preponderance of the evidence the following essential elements:
>
> 1. A defendant intentionally injured the plaintiff, or realized that plaintiff was likely to suffer the injuries complained of, or acted with willful disregard of injuries that plaintiff might suffer;
>
> 2. A defendant's actions were extreme and outrageous taking into consideration the atmosphere and circumstances in which such actions occurred; and

> 3. The plaintiff suffered severe emotional distress as a direct result of a defendant's conduct. Injuries to the nervous system and mental pain are physical injuries which also qualify as severe emotional distress.
>
> If you find plaintiff has proved each of the above elements by a preponderance of the evidence, then you must find in favor of the plaintiff.
>
> On the other hand, if you find plaintiff has failed to prove her claim, then you must return a verdict in favor of the defendants.

See Jury Instruction. No. 18 (Oct. 18, 1990). These are the elements of the tort of intentional infliction of emotional distress under pertinent Tenth Circuit and Oklahoma decisions. *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989); *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986); *Williams v. Lee Way Motor Freight, Inc.*, 688 P.2d 1294 (Okla. 1984); *Breeden v. League Services Corp.*, 575 P.2d 1374 (Okla. 1978); *Floyd v. Dodson*, 692 P.2d 77, 79-80 (Okla. App. 1984) (discussing Oklahoma Uniform Jury Instruction – Civil, No. 19.1).

After returning a verdict in favor of Marshall and against each defendant on this claim,[2] the jury answered a series of special interrogatories as follows:

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[2] As noted in the introductory plaintiff compensatory damages in the amount of $2,500 against Noah and $93,000 against Nelson Electric; and awarded plaintiff punitive damages in the amount of $2,500 against Noah and $62,000 against Nelson Electric.

[QUESTION #1 with JURY'S ANSWERS]

Question 1: Was Nelson Electric's liability based in whole or in part on the following:

A. Nelson ignoring the conduct of Noah after it knew or should have known of the harassment?

Yes X No _ (check one)

B. Nelson acquiescing in the conduct of Noah after it knew or should have known of the harassment?

Yes X No _ (check one)

C. Nelson failing to take prompt action after it knew or should have known of the conduct of Noah in sexually harassing plaintiff?

Yes X No _ (check one)

D. Loaning of employees into Dept. 411?

Yes X No _ (check one)

E. Plaintiff's layoff from Dept. 411 in July, 1987?

Yes X No _ (check one)

F. Employment of other individuals in Dept. 411 after September 12, 1988?

Yes X No _ (check one)

G. Conduct of Bill Hardee in March or April 1987?

Yes X No _ (check one)

H. Conduct of Nelson Electric after September 12, 1986?

Yes X No _ (check one)

[QUESTION #1 continued]

If yes, briefly describe such conduct. You may also refer to any of the above questions which you may have answered "Yes" in responding to this question. If you answer "No" to this question, fill in nothing below.

[JURY'S ANSWER]

It was our feeling that Nelson was not consistant [sic] with documented procedures in:

A. Layoffs
B. Bump Rights
C. Recall Procedures

It was also our feeling that Nelson had limited procedures on what identified sexual harassment and no procedures on methods of employees or management to deal with this problem.

[QUESTION #2]

Question 2: Focusing on your *compensatory* damage awards, why was the amount of *compensatory* damages against Noah $2,500, whereas the amount of *compensatory* damages against Nelson $93,000? Briefly explain.

[JURY'S ANSWER]

Noah was under employment of Nelson Electric who focused on production, not employee relations. Had proper procedures been documented for sexual harassment and correction, more of the responsibility

would have fallen on Noah. Refer to Question – 1A, B, C.

October 19, 1990 /s/ Jack M. Hough
Foreperson

See Special Interrogatories (Oct. 19, 1990) (emphasis in original).

VI. TO WHAT EXTENT ARE THE FINDINGS OF THE JURY WITH RESPECT TO PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM BINDING UPON THE COURT IN THE DETERMINATION OF THE NON-JURY TITLE VII CLAIM?

When a case such as this involves both a jury trial (on the emotional distress claim) and a bench trial (on the Title VII claim) "any essential factual issues which are central to both claims must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues." *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988) (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962)). "Moreover, the court is bound by the jury's determination of factual issues common to both the legal and equitable claims." *Skinner*, 859 F.2d at 1443.

However, to the extent the essential elements of the legal and equitable claims are not the same, the court is not bound by the jury's verdict. *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990). For example, in a case similar to the instant case, where the plaintiff alleged both a Title VII *quid pro quo* claim and a claim for intentional infliction of emotional distress, the jury found in favor of plaintiff on the emotional distress claim and the

district court found in favor of defendant on the Title VII *quid pro quo* claim. Both findings were upheld on appeal. *Snider v. Circle K Corp.*, 923 F.2d 1404 (10th Cir. 1991) (affirming the district court in part and reversing in part, on other grounds).

In the instant case Marshall asserted a Title VII hostile work environment claim and a claim for intentional infliction of emotional distress. The essential elements of each claim are set forth below.

In order to prevail on a claim for intentional infliction of emotional distress plaintiff must prove:

> 1. Defendant intentionally injured the plaintiff, or realized plaintiff was likely to suffer the injuries complained of, or acted with willful disregard of injuries plaintiff might suffer;
>
> 2. Defendant's actions were extreme and outrageous taking into consideration the atmosphere and circumstances in which such actions occurred; and
>
> 3. Plaintiff suffered severe emotional distress as a direct result of defendant's conduct. Injuries to the nervous system and mental pain are physical injuries which also qualify as severe emotional distress.

Eddy v. Brown, 715 P.2d 74 (Okla. 1986); *Williams v. Lee Way Motor Freight, Inc.*, 688 P.2d 1294 (Okla. 1984); *Breeden v. League Services Corp.*, 575 P.2d 1374 (Okla. 1978); *Floyd v. Dodson*, 692 P.2d 77, 79-80 (Okla. App. 1984) (discussing Oklahoma Uniform Jury Instruction – Civil, No. 19.1).

In order to prevail on a Title VII "hostile work environment" claim, plaintiff must prove:

1. Plaintiff belongs to a protected group;

2. Plaintiff was subject to unwelcome sexual harassment;

3. the harassment was based on sex;

4. the harassment affected a 'term, condition, or privilege' of employment; and

5. the employer knew or should have known of the harassment in question and failed to take proper remedial action.

Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1156 (8th Cir. 1988). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment." *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

In the instant case the jury returned a general verdict in favor of Marshall against each defendant on Marshall's intentional infliction of emotional distress claim. Thus, the jury necessarily found Marshall proved each of the essential elements of that claim with respect to each defendant. Moreover, subsequent to receiving the jury's general verdict, the Court asked the jury to return to the deliberation room and answer a series of questions to help the Court interpret the verdict and to serve as an advisory aid to the Court on the remaining Title VII claim. The questions were prefaced with the following note from the Court: "Ladies and Gentlemen of the Jury: What follows is a series of questions known as special interrogatories. Please answer these questions to help us

interpret your verdict." *See* Special Interrogatories (Oct. 19, 1990).

The jury's answers to these special interrogatories likewise constitute factual findings of the jury. Fed. R. Civ. P. 49(b); 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2513 at 532 (1971) (a jury's verdict, whether general, special, or by special interrogatories accompanying a general verdict, constitutes the definitive findings of fact); 5A *Moore's Federal Practice*, ¶ 49.04 at 49-58 (2d Ed. 1991) (the jury's answers to special interrogatories are the jury's "more specific findings of fact").

However, if the intentional infliction of emotional distress claim should not have been submitted to the jury in the first place, the jury's findings are viewed as an academic exercise, a nullity, and nothing more than advisory. Under such circumstances, the jury's factual findings would not be binding on the Court for purposes of the Title VII claim. *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988) (trial court's conditional rulings concerning damages, in the event its ruling on the motion for jnov was reversed, were "advisory" only and were not binding); *Williams v. Slade*, 431 F.2d 605, 609 (5th Cir. 1970) (courts have refused to grant a partial new trial on liability alone where the damages issue had been resolved in a "purely academic atmosphere"); *O'Neill v. United States*, 411 F.2d 139, 146 (3rd Cir. 1969) (trial court's conditional assessment of damages, in the event the defendant's judgment was reversed on appeal, bore the characteristic of an "advisory opinion," was "purely academic" when made, and did not pass through the refining pressure of reality"); *Romer v. Baldwin*, 317 F.2d 919, 923 (3rd Cir. 1963) (when the jury assessed damages

in favor of plaintiff despite finding no liability on the part of defendant, the jury's assessment was "merely an intellectual exercise" and not binding on remand); *Swentek v. USAir, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); *see also Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458, n.4 (4th Cir. 1989).

VII. DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A.. Standard of review for motions for jnov

"Motions for directed verdict and for judgment notwithstanding the verdict are considered under the same standard." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984).[3] The standard was recently summarized by the Tenth Circuit: the test is whether there is evidence upon which the jury could properly find a verdict for the party opposing the motion for directed verdict or motion for jnov. *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990). In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury," but rather "must view the evidence most

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[3] Here the defendants moved for a directed verdict at the close of the plaintiff's case and again at the close of the evidence. The Court took these motions under advisement and invited jnov motions after the return of the jury's verdict in favor of plaintiff. *See Lucas v. Dover Corp.*, 857 F.2d 1397 (10th Cir. 1988). The court now grants the motions for directed verdict as well as the motions for jnov.

favorably to the nonmoving party and give that party the benefit of all reasonable inferences from the evidence." *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984); *see also Rajala*, 919 F.2d at 615; *Berry v. City of Muskogee, Okla.*, 900 F.2d 1489, 1496 (10th Cir. 1990); *Sandlin v. Texaco Refining & Mktg, Inc.*, 900 F.2d 1479, 1483 n.5 (10th Cir. 1990); *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1231 (10th Cir. 1990); *Royal College Shop, Inc. v. Northern Ins. Co. of N.Y.*, 895 F.2d 670, 677 (10th Cir. 1990); *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988).

The district court's ruling on a motion for directed verdict or for jnov is reviewed *de novo* by the Tenth Circuit, applying the same standard as that used by the district court. *Rajala*, 919 F.2d at 615; *Sandlin*, 900 F.2d at 1483 n.5; *Brown*, 736 F.2d at 613.

The Court notes that this standard of review has recently become somewhat blurred. The following three recent opinions of the Tenth Circuit that could be said to stand for the proposition that a ruling on a motion for directed verdict or for jnov is reviewed under a manifest abuse of discretion standard: *Snider v. Circle K Corp.*, 923 F.2d 1404, 1409 (10th Cir. 1991); *Sil-Flo Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1519 (10th Cir. 1990); and *Key v. Liquid Energy Corp.*, 906 F.2d 500, 502 (10th Cir. 1990).

In *Snider* the district court apparently denied Circle K's motion for directed verdict. On appeal the Tenth Circuit stated: "Circle K alternatively argues that the district court should not have submitted Snider's . . . claim to the jury. . . . [W]e review the district court's decision under an abuse of discretion standard." *Snider*, 923 F.2d at 1409.

In *Key* the district court denied a motion for directed verdict and a motion for jnov. The Tenth Circuit stated: "In ruling on an appellant's request to overturn a trial court for failure to direct a verdict or grant a JNOV, the appeals court must determine whether the trial court's refusal to set aside the jury verdict constituted a manifest abuse of discretion." *Key*, 906 F.2d at 502.

Both *Snider* and *Key* cited *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1456 (10th Cir. 1987), to support the "abuse of discretion" standard. However, *Karns'* "manifest abuse of discretion" language referred to the standard for reviewing a district court's ruling on a motion for new trial, not a motion for directed verdict or for jnov. *Karns*, 817 F.2d at 1456. *Key* also cited *Brown v. McGraw Edison Co.*, 736 F.2d 609, 616 (10th Cir. 1984). Again, the *Brown* "abuse of discretion" language referred to the standard for reviewing a ruling on a motion for new trial. *Brown*, 736 F.2d at 616.

Sil-Flo reviewed the district court's denial of defendant's motion "for jnov or new trial" and used *both* standards without distinguishing between them. *Sil-Flo*, 917 F.2d at 1519. For example, the paragraph discussing the standard of review contains four sentences, each followed by a case citation. First, for its "manifest abuse of discretion" language, *Sil-Flo* cited *Harvey ex rel. Harvey v. General Motors Corp.*, 873 F.2d 1343, 1346 (10th Cir. 1989). *Harvey* was a "new trial" case. Second, for its language that "so long as a reasonable basis exists for the jury's verdict, we will not disturb the trial court's ruling," *Sil-Flo* cited *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1260 (10th Cir. 1988). *McAlester* used the quoted language with reference to reviewing a ruling on a motion for new

trial. Third, for its language that "our role is not to determine anew whether in our judgment [defendant] should have been liable on these claims," *Sil-Flo* cited *Patty Precision Prods. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988). *Patty Precision* was also a "new trial" case. And fourth, for its language that "we consider only whether the evidence and all reasonable inferences to be drawn therefrom so clearly mandates that [defendant] could not be held liable that reasonable minds could not differ on this result," *Sil-Flo* cited *Ryder v. City of Topeka*, 814 F.2d 1412, 1418 (10th Cir. 1987). *Ryder* was a "jnov" case.

After carefully studying these authorities, there is no question in this Court's mind that a district court's ruling on a motion for directed verdict or for jnov is reviewed *de novo* by the appellate court, and a ruling on a motion for new trial is reviewed for manifest abuse of discretion. These two standards were clearly described by Chief Judge Holloway in *Brown v. McGraw Edison Co.*, 736 F.2d 609 (10th Cir. 1984), and have been often repeated. Accordingly, this Court is convinced the three recent opinions discussed above do not properly state the law if, and to the extent, they hold a district court's ruling on a motion for directed verdict or for jnov is reviewed under an abuse of discretion standard.

B. Factual arguments directed toward sufficiency of plaintiff's evidence

Clearly, not every discrimination claim, whether it is based on age, race, national origin, or gender, automatically

supports a claim for intentional infliction of emotional distress. *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 384-85 and n.8 (10th Cir. 1988). Only if the manner of discrimination is beyond all possible bounds of decency or is regarded as utterly intolerable in a civilized community may plaintiff reach the jury on an intentional infliction of emotional distress claim. *Id.* at n.8.

In the instant case, defendants make two arguments that Marshall's evidence was insufficient to warrant submission of the emotional distress claim to the jury.[4] First, both defendants argue Marshall failed to introduce sufficient evidence of truly outrageous conduct on the part of Noah. Second, defendant Nelson Electric argues that because Marshall failed to introduce any evidence of outrageous conduct other than the acts of *Noah*, Nelson Electric cannot be held liable. For purposes of the instant motion, the Court accepts Marshall's testimony at face value and views it in the light most favorable to her.

In that light, the Court rejects defendants' first argument. Considering the evidence as summarized in Section IV, *supra*, the Court finds there was sufficient evidence from which the jury could find Noah engaged in extreme and outrageous conduct causing Marshall emotional distress.

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[4] The Court submitted the intentional infliction of emotional distress claim to the jury, but took under advisement the statute of limitations issue discussed in Secion [sic] VII.C. of this order. The defendants subsequently moved for directed verdicts on the statute of limitations issue at the close of plaintiff's evidence, and for jnov on the statute of limitations issue following the return of the verdict.

Defendant Nelson Electric's next argument is that it cannot be liable because Marshall introduced evidence of Noah's conduct only, and failed to introduce any evidence of outrageous conduct on the part of Nelson Electric. In response, Marshall points out she advanced two theories of liability with respect to Nelson Electric: (1) that Nelson Electric is vicariously liable for the acts of Noah, under the theory of *respondeat superior,* since Noah was acting within the scope of his employment; and (2) that Nelson Electric is directly liable as a result of its own conduct in ignoring and acquiescing in Noah's conduct.

As noted earlier, there was evidence regarding how Nelson Electric responded to Noah's conduct, and the jury expressly found Nelson Electric ignored and acquiesced in Noah's conduct and failed to take prompt corrective action. Moreover, the Tenth Circuit has expressly upheld an intentional infliction of emotional distress jury award against an employer who ignored and acquiesced in the conduct of one of its employees. *Baker v. Weyerhaeuser Co.,* 903 F.2d 1342, 1347 (10th Cir. 1990) ("Baker's action against Weyerhaeuser was based on Weyerhaeuser's own conduct, namely, its utter failure through its officers and supervisors to take action against [co-worker] Caldwell, a known sexual harasser of females."). Accordingly, the Court also rejects Nelson Electric's second argument.

Thus, defendants' motions for jnov are denied to the extent they argue Marshall's evidence was insufficient to submit the intentional infliction of emotional distress claim to the jury

This, however, does not end the inquiry because at the time the Court submitted the emotional distress claim to the jury it expressly reserved ruling on the statute of limitations issue.

C. The statute of limitations issue

The Court expressed concern about the statute of limitations issue at the time the emotional distress claim was submitted to the jury. Now, after careful consideration, the Court concludes the emotional distress claim should not have been submitted to the jury.

The applicable statute of limitations for the claim of intentional infliction of emotional distress is two years. *Chandler v. Denton,* 741 P.2d 855 (Okla. 1987). Marshall filed her complaint on September 12, 1988. Thus, absent some exception to the general rule, her claim is barred to the extent it is based on conduct that occurred before September 12, 1986.

Viewing Marshall's evidence in the light most favorable to her, Noah's harassment began in 1985. However, Marshall left Department 411 on August 12, 1986, and thus was no longer in the same department as Noah. Marshall testified Noah's harassment "pretty much stopped" at that time, and she acknowledged Noah's conduct was less frequent and less explicit when compared to his conduct while she was in Department 411. Her testimony concerning Noah's conduct after she left Department 411 and entered Department 710 can be summarized as follows: Noah wriggled his tongue at her in a sexual way, brushed against her in the hallway, called her supervisor in Department 710 to ask where she was,

watched her working, and approached her in the new department and touched her by pinching her on the arm. *See* Plaintiff's Second Proposed Findings of Fact and Conclusions of Law at 4-5 (Oct. 15, 1990).

"It is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the §46 standards. Only when it is found that reasonable [persons] would differ in an assessment of this critical issue may the . . . claim be submitted to a jury." *Eddy v. Brown*, 715 P.2d 74, 76-77 (Okla. 1986). Liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* at 77 (quoting Restatement of Torts (Second) §46, comment d). To be actionable, the conduct must be beyond all possible bounds of decency in the setting in which it occurred or be regarded as utterly intolerable in a civilized community. *Id.* at 77; *Haynes v. South Community Hospital Management, Inc.*, 793 P.2d 303, 306 (Okla. App. 1990); *Bostwick v. Atlas Iron Maters, Inc.*, 780 P.2d 1184, 1188 (Okla. App. 1988).

Since Marshall filed her Complaint on September 12, 1988, the applicable limitatins [sic] period begins on September 12, 1986. The Court finds as a matter of law the conduct that occurred after September 12, 1986, was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Moreover, in oral argument on this issue Marshall conceded as much.[5]

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[5] In oral argument on this issue on November 9, 1990, Marshall's counsel conceded Noah's conduct after August 12,

However, in a good faith attempt to defuse this concession, Marshall argues Noah's conduct was a continuing tort and the Court must therefore consider all of Noah's acts, no matter how long ago they occurred, since some non-extreme/non-outrageous acts occurred after September 12, 1986.

This argument presents a difficult and close question of law. However, after careful consideration and for the reasons set forth below, the Court rejects Marshall's argument. The Court concludes that under the circumstances of this case the statute of limitations requires the Court to initially consider the conduct that occurred within the limitations period. Unless the conduct that occurred within the limitations period was sufficiently extreme and outrageous to support an intentional infliction of emotional distress claim, plaintiff's claim is time-barred.[6]

1986 (when she transferred into a different department) was not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Marshall indirectly made the same concession in her brief. *See* Plaintiff's Brief in Response to Nelson Electric's Motion for Directed Verdict at 13-14 (Oct. 12, 1990) ("Plaintiff only testified that the harassment pretty much stopped after she left Department 411 because the conduct by Noah was less frequent and less explicit when compared to his conduct in the Mod Center.")

[6] During the trial of the case, the Court admitted evidence of defendant's conduct *outside* the statute of limitations on the assumption the continuing tort doctrine might apply, with the understanding the matter would be reviewed at the close of the evidence. The Court also believed evidence outside the statute of limitations period would be admissible under Federal Rule of Evidence 404(b) if defendants' statute of limitations arguments were overcome.

While the continuing tort doctrine has long been applied to a variety of actions, including trespass, nuisance, and false imprisonment, it has only in recent years begun to be applied to claims for intentional infliction of emotional distress.

There are no decisions from Oklahoma courts or from the Tenth Circuit on this exact issue. However, the Tenth Circuit addressed a strikingly similar issue in *Manders v. Oklahoma ex rel. Dept. of Mental Health*, 875 F.2d 263 (10th Cir. 1989), and other jurisdictions have addressed the issue.

In *Manders*, plaintiffs raised sexual harassment claims against their supervisor under Title VII and 42 U.S.C. § 1983. The statute of limitations on a section 1983 claim is two years. Since the plaintiffs filed their complaint on May 5, 1986, the Tenth Circuit looked at the evidence concerning defendant's conduct after May 5, 1984, and found no acts or allegations sufficient to support plaintiffs' claim. The plaintiffs argued defendant Haney continued to sexually harass them after May 5, 1984, by acting vengefully in response to their rebuffs. *Manders*, 875 F.2d at 265. Plaintiffs contended Haney's vengefulness was a continuation of his earlier sexual harassment because it was intended to punish them for not acquiescing to his sexual advances. *Id.* However, the Tenth Circuit disagreed and affirmed the trial court's decision to grant summary judgment based on the statute of limitations.

Similarly, in *Koster v. Chase Manhattan Bank*, 609 F. Supp. 1191 (S.D.N.Y. 1985), plaintiff sued for sex discrimination under Title VII and for intentional infliction of

emotional distress. Applying the New York one-year statute of limitations for the emotional distress claim, the court held "all acts occurring before the limitations period are excluded from consideration." *Id.* at 1198. Since there was no evidence that any conduct occurring within the limitations period "in and of itself [was] sufficiently extreme, outrageous and uncivilized to be actionable," the court entered summary judgment in favor of defendant. *Id.*

The Eighth Circuit appears to take the same approach as that taken by the Tenth Circuit in *Manders* and by the district court in *Koster.* In *Gross v. United States,* 676 F.2d 295 (8th Cir. 1982), a farmer sought damages for intentional infliction of emotional distress allegedly resulting from a government agency's actions to thwart plaintiff's participation in the United States Department of Agriculture's feed grain program. The Eighth Circuit held the statute of limitations for the claim of intentional infliction of emotional distress "generally runs from the date of the last tortious act." *Id.* at 300. "[T]he focus should be on when the last tortious act occurred." *Id.* In *Gross* the appellate court could not determine from the record whether the last tortious act occurred within the limitations period and accordingly remanded for a determination of that issue. Although the district court had made a finding concerning an incident that occurred within the limitations period, the district court had not made clear whether the incident was an extreme and outrageous act constituting intentional infliction of emotional distress. *Id.* The Eighth Circuit stated that unless that incident constituted tortious (i.e. extreme and outrageous) conduct, plaintiff's action must be dismissed as outside the

statute of limitations. *Id.* Here, there clearly was no tortious (extreme and outrageous) conduct by Noah within the two year statute of limitations.

The Ninth Circuit has taken a somewhat different approach. Applying California law, the Ninth Circuit focused on the severity of the harm done to the plaintiff, holding that a cause of action for intentional infliction of emotional distress accrues at the moment plaintiff's injury is "severe enough to constitute intentional infliction of emotional distress." *Eisenberg v. Insurance Co. of North America,* 815 F.2d 1285, 1292 (9th Cir. 1987). Even applying this standard, however, plaintiff's intentional infliction claim arose well prior to September 12, 1986.

There are authorities apparently holding *any* continuing act that occurs within the limitations period is sufficient to bring with it all the previous acts that occurred outside the limitations period. In *Page v. United States,* 729 F.2d 818 (D.C.Cir. 1984), a veteran sued the Veterans Administration for injuries allegedly resulting from being subjected to harmful drugs during a course of treatment from 1961 to 1980. The Court of Appeals held "the cause of action [based on] continuous drug treatment did not accrue, and the statutory limitations did not come into play, until the allegedly tortious conduct came to a halt in 1980." *Id.* at 823. In *Everly v. United Parcel Service, Inc.,* 1989 WL 81961 (N.D.Ill. 1989) (not reported in F.Supp.), the plaintiff alleged she was subjected to years of harassment, insults and discriminatory treatment at the workplace. The district court denied defendants' motion to dismiss the action, finding the cumulative effect of the conduct stretching across the years was sufficiently outrageous to defeat the dismissal motion. On the statute of

limitations issue, the court stated "the statute of limitations does not begin to run on a continuing wrong until the wrong is 'over and done with' . . . and [plaintiff's claim] is not time barred by the statute of limitations." *Id.* The court focused on the last act of the defendant, apparently without regard to whether that act was extreme and outrageous. In *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. App. 1990), *error granted*, No. 3-88-095-CV (Dec. 19, 1990), plaintiff sought damages for negligent infliction of emotional distress based on her husband's continued attempts, over a period of years, to have her engage in deviant sexual acts with him. The Texas appellate court stated the statute of limitations on plaintiff's claim did not begin to run "until the tortious acts [had] ceased." *Id.* at 821. Also, in *Rochon v. FBI*, 691 F.Supp. 1548 (D.D.C. 1988), involving racial discrimination claims under Title VII, 42 U.S.C. § 1985, and a claim for intentional infliction of emotional distress, the court applied the continuing tort doctrine and held the statute of limitations did not start running until the time the tortious conduct ceased. *Id.* at 1563.

The Court recognizes this legal issue is a close one. However, the Court believes it should follow the Tenth Circuit's approach in *Manders* as discussed above. Further, the Court believes the reasoning underlying the decisions in *Manders*, *Koster*, and *Gross* is sound. Any other result would subject defendants to never-ending liability for such claims, which could at any time be triggered by non-extreme, non-outrageous, and non-tortious acts. Merely alleging that such non-actionable conduct was an extension of actionable conduct would resurrect stale time-barred conduct. Such a result would

be fundamentally foreign to the purpose of statutes of limitation.

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence." *Wood v. Carpenter,* 101 U.S. 135, 139 (1879). They balance "the interests in favor of protecting valid claims" against "the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-64 (1975).

Once the statutory period has passed, a party can carry on its affairs with confidence that it need not worry about contingent liabilities.

> [Statutes of limitation] are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979). Courts recognize that the application of "statutes of limitation result in hardship to plaintiffs in some cases." *Steele v. United States,* 599 F.2d 823, 828 (7th Cir. 1979). However, "alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Const., Inc. v. United States,* 303 F.2d 366, 368-69 (3d Cir.), *cert. denied,* 371 U.S. 877 (1962).

> [Statutes of limitation] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the

> voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. Since the legislature is the appropriate body to make such policy decisions, the only task for the courts is to determine whether the claim is within the coverage of the statute.

Here, faced with this limited task, the Court determines that Marshall's claim is not within the coverage of the statute.

In the instant case Marshall concedes, and the Court finds as a matter of law, the alleged conduct that occurred during the two-year period immediately preceding the filing of the complaint, that is, the conduct that occurred after September 12, 1986, was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Because no "extreme and outrageous" conduct occurred within the statute of limitations period, and because Marshall cannot use the continuing tort doctrine to resurrect the time-barred conduct under the circumstances of this case, Marshall's claim is barred by the statute of limitations.

Accordingly, defendants' motions for directed verdict and jnov on Marshall's emotional distress claim are granted based on the two-year statute of limitations.[7]

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[7] Because the intentional infliction claim should not have been submitted to the jury, the jury's findings on this claim are not binding on the Court. See Section VI, *supra.*

D. If the Court's grant of jnov is incorrect as a matter of law, the Court conditionally grants defendants' motion for a new trial

Rule 50 of the Federal Rules of Civil procedure is titled "Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict." Rule 50(c)(l) provides, in pertinent part:

> (c) [Motion for Judgment Notwithstanding the Verdict]: Conditional Rulings on Grant of Motion.
>
> (1) If the motion for judgment notwithstanding the verdict . . . is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. . . .

Fed. R. Civ. P. 50(c)(1).

The Eleventh Circuit has noted "the only conditional ruling allowed by Fed. R. Civ. P. 50 is a conditional ruling for a new trial should the trial court's grant of a motion for judgment n.o.v. be overruled." *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

As indicated previously, the statute of limitations issue in this case is a difficult and close one. Recognizing that the Court's grant of defendants' motion for judgment notwithstanding the verdict on statute of limitations grounds might be reversed on appeal given the split of authority on the statute of limitations issue, the Court next proceeds to determine whether the defendants'

motion for new trial should be conditionally granted. Fed. R. Civ. P. 50(c)(l); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2537-2540 (1971 & Supp. 1991).

In this case, the jury found Noah's harassment was extreme and outrageous and awarded compensatory damages in the amount of $2,500 against Noah. The jury also found Nelson Electric's conduct was extreme and outrageous and awarded compensatory damages in the amount of $93,000 against Nelson Electric. Because of the jury's varying awards of compensatory damages against Noah and Nelson Electric, and because these varying awards are so contrary to the evidence, the Court finds the jury's verdict may not stand even if the statute of limitations question was wrongly decided.

Compensatory damages are meant to compensate a plaintiff for actual injuries. *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 288 (N.D. Ind. 1985). Such damages are not intended to provide a windfall to plaintiff. *Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc.*, 589 F. Supp. 1076, 1082 (M.D. Tenn. 1984). Nor are they for the purpose of punishing a defendant or deterring similar conduct in the future. *In Re Klotz*, 53 B.R. 148 (D.N.M. 1985).

The jury explained the differing amounts of actual damages in their responses to special interrogatories. The jury believed Nelson Electric did not act consistent with its documented procedures regarding layoffs, "bump rights," and recalls. The jury also believed Nelson Electric had limited procedures concerning the identification of sexual harassment and had no procedures concerning how its employees or management personnel were to

deal with the problem. The jury believed Nelson Electric focused on production rather than on employee relations. Finally, the jury stated: "Had proper procedures been documented for sexual harassment and correction, more of the responsibility would have fallen on Noah." Special Interrogatories (Oct. 19, 1990) (Jury's answer to question #2).

While the jury clearly found fault with Nelson Electric's conduct, which conduct they punished by way of punitive damages, the varying awards of $93,000 compensatory damages against Nelson Electric and $2,500 compensatory damages against Noah are irreconcilably inconsistent and against the great weight of the evidence. *Swentek v. U.S. Air, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); *see also Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458, n.4 (4th Cir. 1989).

While it is, of course, impossible to determine the jury's actual intention when it awarded such drastically differing amounts of compensatory damages, it is more likely than not that the awards arose out of the jury instructions on compensatory damages, which permitted jury confusion on the issue. Although the jury instructions may not have made it clear, the injury to Marshall may not be reasonably or logically divided in the way the jury attempted to do it. The jury apparently attempted to apportion damages between the individual defendant and the deep-pocket corporate defendant. But, if defendants are liable to Marshall for tortious conduct, they are jointly and severally liable, *Bell v. Mickelson*, 710 F.2d 611

(10th Cir. 1983), and the jury's attempted apportionment of compensatory damages was improper.

Accordingly, the Court conditionally grants defendants' motion for a new trial pursuant to Federal Rule of Civil Procedure 50 in the event the Court's directed verdict/jnov ruling is reversed.

VIII. FINDINGS OF FACT ON MARSHALL'S TITLE VII CLAIM AGAINST NELSON ELECTRIC

If any finding of fact in this order should more properly be designated a conclusion of law, it is hereby deemed a conclusion of law.

A. Stipulated Facts

1. Plaintiff was employed at Nelson Electric from October 4, 1976 until July 2, 1987.

2. On August 16, 1986, plaintiff was laid off from Department 411 and chose to bump into Department 710.

3. Luther Noah's employment with Nelson Electric ceased as of November 1, 1986.

4. On June 15, 1987, plaintiff voluntarily chose to be laid off from Department 710 and chose to bump into Department 411.

5. Effective July 2, 1987, plaintiff and Jackie Howell were laid off from Department 411.

6. Plaintiff filed a formal complaint of sexual harassment with the Oklahoma Human Rights Commission on December 16, 1987.

7. On September 12, 1988, plaintiff filed this lawsuit.

B. Noah's conduct and Marshall's participation in the sexually charged atmosphere

1. Marshall was an employee of Nelson Electric, a Unit of General Signal Corporation, from October 4, 1976 to July 2, 1987. In 1978, Marshall transferred into the Modification ("Mod") Center of Department 411, Cast Assembly. Approximately four women worked in the Mod Center as regular employees in 1985 and 1986. Department 636, Flame Seals or firestop putty, was added to the workload of Department 411 in the mid-80's. For all accounting and labor reports, Department 636 work was treated as part of Department 411. During the years 1985 and 1986, while employed with Nelson Electric and working in Department 411 with foreman Noah, Marshall was subjected to numerous specific instances of sexual harassment. This harassment was not made a condition of her continuing employment. She was the victim of offensive touchings by Noah and was subjected to sexual comments and innuendos by Noah.

2. Noah also subjected other women, including Juanita Holloman, to similar harassments, but of less magnitude.

3. Specifically, Noah would call Marshall up to his desk and show her pornographic pictures, read sexual acts from the Bible to her, comment about her body, tell her that he would like to do specific sexual things to her.

4. Marshall's version of the alleged harassment was seriously called into question. Moreover, sexual harassment was an unlikely source of Marshall's emotional problems. Her treating physician, Dr. Chop, credibly demonstrated this point.

(a) Chop began treating Marshall on January 14, 1988, for pain, numbness and physical complaints. He last saw her on March 29, 1988. Despite the fact the Chop treated Marshall for two months, absent from Chop's testimony and medical records is any prelitigation reference by Marshall to *sexual* harassment at her workplace. Instead, Marshall blamed her symptoms on a work-related injury that occurred in March 1987.

(b) According to Chop, Marshall specifically attributed her weight gain problem to the worker's compensation accident. She also related to Chop a suicide attempt which resulted from her husband beating her. In Chop's opinion, it was "almost impossible" to determine the source of Marshall's many problems, including depression. Chop credibly testified that sexual harassment was an unlikely cause of Marshall's emotional problems.

(c) Nelson Electric's exhibit 54 contains Dr. Chop's notes as well as several other papers. The third page of the exhibit, bearing a page number of 499, contains Chop's notes of the oral history given by Marshall to Chop during Marshall's initial visit. There is no reference to any sexual harassment. It states in part:

> Patient presents with long, somewhat vague history of ten months of problems with pain in her neck, back and numbness extending into the

> arms and the hands with a very worried affect about this. . . . She has had a normal EMG on the left upper extremity where she has experienced most of her numbness and shooting pain a month after the initial work accident which occurred 3/2/87, where she was spun around by a machine. . . .

(d) The next page of exhibit 54, bearing page number 500, contains Chop's notes regarding Marshall's visit of January 27, 1988. There is no reference to harassment. There is mention, however, of Marshall's suicide gesture, which Chop described in part as follows:

> In addition, patient has transverse scars on the left wrist from a suicidal gesture about ten to 15 years ago that resulted when her husband was beating her quite a bit.

(e) Chop also noted that Marshall had a "[h]istory of being abused by her current husband." The notes regarding Marshall's visits of February 25, 1988, and March 29, 1988, are shown on pages 503 and 504 of the exhibit. There is no reference to any harassment. The only reference to any harassment in the entire exhibit is contained on pages 505-506 which is the note Marshall gave to Chop on April 5, 1988.

(f) The note, which was written for litigation purposes, states in part:

> Dr. Chop my lawyer needs a copy from you, & I am also getting one from my pshyc., Dr. Farley. He needs the date in Jan. that I first came in and put me on med. & referred me to pshyc.
>
> 1. Date in Jan. temporarily disabled to work due to harassment from work &/or injury.

* * *

> My lawyer is putting me back on drawing workman's comp. again & making them pay for my pshyco. but he also needs the copy from you that started temp. disabled to work starting Jan. . . .

During his testimony, Chop discussed this note and his refusal to provide Marshall's attorney the information requested by Marshall because, according to Chop, he "wasn't willing to try to make this appear to be a work-related injury."

(g) Nelson Electric's exhibit 55 contains eleven pages in Marshall's handwriting, explaining her problems. There is no reference in the exhibit to any alleged harassment. Marshall admitted during her cross-examination that she prepared this document for Chop to describe the pain that she was suffering.

5. Noah was a poor witness as well. His testimony was likewise impaired on cross-examination by plaintiff's counsel. Moreover, it was clear to the Court that Noah was, indeed, a "dirty old man." Unfortunately, however, many of Marshall's claims regarding Noah were exaggerated, with the Court being left to sift through the tattered remains of the credibility of these two witnesses. The Court finds that the truth is somewhere between the two versions advanced, but only as reflected in these findings. Significantly, however, the Court finds that the harassment and sexual atmosphere discussed in this Order was not made known to Nelson Electric's management until late in the game, and when it was, Nelson took proper remedial action.

6. Marshall welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions she asked Noah to leave her alone.

7. On cross-examination, Marshall acknowledged she also used "dirty talk" in the workplace; admitted from time to time she had asked others at work whether they had sex the night before; admitted she did not mention sexual harassment in the union grievance she pursued in connection with her layoff; conceded she was involved in an incident when Noah's pants were pulled down at work; and acknowledged that despite this alleged harassment at the hands of Noah, she repeatedly contacted Nelson Electric management after her transfer to another department asking to be transferred back into Noah's department and placed under his supervision. Several other witnesses corroborated Marshall's central role in the sexually charged atmosphere of Department 411.

8. While working in Department 411, Marshall molded firestop putty, a product of Nelson Electric, into penises and figures with large genitals. These molded figures were proudly displayed by Marshall and by her co-employees in Department 411, Metta McGee, Juanita Holloman and Pat Souhrada McDannald. Marshall's co-employees testified that Marshall made many of the penises, at least as many as the other employees, and seemed to enjoy making them. This rebuts Marshall's testimony that she only made one such penis in an attempt to embarrass Noah so that he would quit making them. Marshall's rebutted testimony is rejected by the Court.

9. The Court also rejects Marshall's claim that on Friday, August 8, 1986, Noah pressured her to meet him at his church to have sex. The Court further rejects the notion that a heated argument ensued when Marshall refused, that Noah threatened to lay her off, and that in retaliation Noah informed Marshall on the next Monday that she was being laid off. The Court finds this testimony unworthy of belief.

10. Marshall was not subjected to continuous and relentless instances of sexual harassment by Noah, as she alleges, especially when viewed in light of her own conduct, the indications she gave to her co-workers regarding such conduct, the totality of circumstances and the context and environment of Department 411. Acquiescence in sexual harassment was not a condition of her continuing employment. Marshall was a leading participant, if not the leader, in the sexually charged environment, according to the credible testimony of her co-workers, witnesses Metta McGee, Pat Sourhada, Juanita Holloman, and of Noah.

11. Noah did not keep Marshall out of Department 411 in retaliation for her refusal to have sex with him.

12. After Marshall left Department 411 and began working in Department 710, Noah did not continue to harass her. As Marshall testified, the harassment "pretty much stopped" at that time. The Court finds it stopped altogether after Marshall left Department 411.

C. Additional findings regarding liability of Nelson Electric.

1. On June 30, 1986, John Fitzgerald, the Union Shop Steward, told Bill Coleman, Human Resources Specialist for Nelson Electric, that there was a problem with "dirty talk" in Department 411 but that he believed he had solved the problem, that Coleman did not need to take any action, and that if he needed assistance from Coleman in the future he would notify Coleman.

2. As the Union Shop Steward, Fitzgerald was responsible for handling Marshall's complaints and Coleman was justified in relying upon Fitzgerald's representations that he believed he had the problem concerning "dirty talk" in Department 411 solved. Both Fitzgerald and Coleman thereafter checked the Department 411 work area on occasion and observed no problem. After June 30 and until October 20, 1986, Marshall did not complain again. Indeed, in September of 1986, after she had been laid off from Department 411 and bumped into Department 710, she filed a grievance seeking to return to Department 411. These circumstances were further indications to Nelson Electric that Marshall did not object to the environment in Department 411. On October 20, 1986, Marshall complained directly to Nelson Electric for the first time.

3. On August 16, 1986, Marshall was laid off from Department 411 solely due to economic conditions. Orders for products in the Marshall's product group decreased significantly for four to six weeks before Marshall was laid off. Labor hours in Marshall's product group also decreased at the time Marshall was laid off.

4. After her layoff from Department 411, and while Noah still worked in that department, Marshall continuously attempted to return to the department. Marshall testified at her arbitration hearing: "[I] was continuously trying to get back into Department 411."

5. Ultimately, on October 20, 1986, Marshall complained about the harassment to the President of Nelson Electric, Ivan Ellsworth, and also filed her complaint with the EEOC thereafter. Ellsworth instructed the Human Resources Department to conduct an investigation, which it did. Bill Coleman, the Human Resources Manager for Nelson Electric, took recorded statements of the employees in the Mod Center.

6. Nelson Electric took immediate action after receiving Marshall's written complaint. An investigation was conducted and Marshall's coworkers were interviewed. Upon completion of the investigation Noah was notified that he would no longer work at Nelson Electric effective November 1, 1986. After November 1, 1986, Marshall had no contact with Noah until she filed this lawsuit.

7. On July 2, 1987, Marshall and a male coworker were laid off from Department 411. Upon being notified of this layoff, Marshall read and signed a form indicating she did not wish to bump into any other position.

8. During 1986 and 1987 the non-salaried workforce at the plant where Marshall worked decreased from 198 to 115 employees. The economic downturn in Department 411 merely reflected the continuing decrease in the overall work force at Nelson Electric during these years.

9. Marshall's layoffs were accomplished pursuant to and in compliance with the terms of the Collective Bargaining Agreement.

10. Moreover, Noah was not acting within the scope of his authority as a foreman at Nelson Electric when he sexually harassed Marshall.

11. Nelson Electric had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser, and had a policy against sexual harassment.

D. Other factual findings

1. The Court finds Marshall belongs to a protected group.

2. The Court finds Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

3. However, the Court also finds that although Noah was a foreman, he was not a supervisory employee within the meaning of Title VII. Thus, Nelson Electric is not automatically liable for the acts of Noah under Title VII. Rather, Nelson Electric is liable for the acts of Noah only if it knew or should have known of the harassment and failed to take appropriate remedial action.

4. The Court finds Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986.

5. Moreover, the Court finds that once Nelson Electric was made aware of the harassment, Nelson took proper remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah.

6. The Court finds that none of the layoffs of Marshall were due to sexual discrimination. Rather the layoffs were due solely to economic motives concerning the business turndown at Nelson Electric and/or the lack of work in Department 411.

7. The Court concludes Marshall was not laid off in retaliation for her complaint about harassment.

IX. CONCLUSIONS OF LAW ON MARSHALL'S TITLE VII CLAIM AGAINST NELSON ELECTRIC

If any conclusion of law in this order should more properly be designated a finding of fact, it is hereby deemed a finding of fact.

1. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [his or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The phrase "terms, conditions, or privileges of employment" encompasses the entire spectrum of disparate treatment of men and women in employment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

2. Sexual harassment is a form of employment discrimination prohibited by Title VII: *Id.* at 65; *Jones v.*

Flagship Int'l., 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

3. Circuit courts have expressed their strong concern for the "menace of sexual harassment in the workplace." *See, e.g., Starett v. Wadley*, 876 F.2d 808, 815 n.9 (10th Cir. 1989); *see also Williams v. Maremont Corp.*, 875 F.2d 1476, 1477 and 1485 (10th Cir. 1989) (employer had legal right to terminate supervisory employee based in part on evidence that he pulled down his zipper and told female employee "if you want it here it is").

4. Two distinct forms of sexual harassment are actionable under Title VII: (a) quid pro quo and (b) hostile work environment. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). *See also Meritor*, 477 U.S. at 66.

5. In this case Marshall sought relief under the hostile work environment theory.

6. In order to state a prima facie case under the hostile work environment theory Marshall must prove:

a. she belongs to a protected group;

b. she was subject to unwelcome sexual harassment;

c. the harassment was based on sex;

d. the harassment affected a "term, condition, or privilege" of employment; and

e. Nelson Electric knew or should have known of the harassment in question and failed to take proper remedial action.

Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1156 (8th Cir. 1988).

7. "[N]ot all workplace conduct that may be described as "harassment" affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.' " *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). "[T]he trier of fact must determine the existence of sexual harassment in light of 'the record as a whole and 'the totality of circumstances, such as the nature of the sexual advances had the context in which the alleged incidents occurred.' " *Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

8. Courts may properly resort to EEOC guidelines for guidance in sexual harassment cases. *Meritor*, 477 U.S. at 65.

9. Title 29 C.F.R. § 1604.11 sets forth the EEOC guidelines defining sexual harassment.

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> * * *
>
> (c) Applying general Title VII principles, an employer . . . is responsible for its acts and those of its *agents and supervisory employees* with respect to sexual harassment regardless of

> whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. . . .
>
> (d) With respect to conduct between *fellow employees,* an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. § 1604.11 (a),(c),(d) (1988) (emphasis added).

10. In *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986), the United State Supreme Court rejected the standard of strict liabiiity of an employer for sexual harassment by its supervisors in a hostile work environment claim.[8]

11. Title VII defines "employer" to include any "agent" of the employer. Thus, the determination depends on agency principles. In *Meritor,* the Supreme Court discussed the issue of employer liability for the acts of its employees, but "decline[d] to issue a definitive rule on employer liability." *Meritor,* 477 U.S. at 72.

The trial court in *Meritor* had determined that the bank (employer) was not liable because it did not have notice of the alleged conduct, finding that notice to the alleged harasser (who was the vice president of the bank

---

[8] Prior to *Meritor* the EEOC and some cases held the employer strictly liable for the acts of its supervisors, regardless of knowledge; other courts held that the employer was liable only if it knew or should have known of the harassment and failed to take prompt remedial action. *Henson, supra; Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983).

and the manager of the branch office where the conduct occurred) was not the equivalent of notice to the bank. The Court of Appeals took the opposite view and held the bank strictly liable for the manager's conduct even though the bank did not know and could not reasonably have known of the alleged misconduct. The Court of Appeals held that "a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an 'agent' of his employer for all Title VII purposes, since 'even the appearance' of such authority may enable him to impose himself on his subordinates." *Id.* at 69-70.

The Supreme Court rejected the strict liability view adopted by the Court of Appeals. The Supreme Court described the varying positions taken by the plaintiff, the defendant, and the EEOC (amicus curiae), but declined to adopt any of those positions. Instead, the Court said:

> We do agree that Congress wanted courts to look to agency principles for guidance in this area. . . . Congress' decision to define 'employer' to include any 'agent' of the employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. *See generally* Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Id.*

In addition, the Supreme Court rejected the view that the mere existence of a policy against discrimination and a

grievance procedure coupled with the plaintiff's failure to invoke the procedure, necessarily insulates the employer. In *Meritor* the policy was a general one and did not address sexual harassment in particular; moreover, the grievance procedure required the complainant to complain first to the direct supervisor who, in this case, was the alleged harasser. *Meritor*, 447 U.S. at 72-73.

12. In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987), the Tenth Circuit described its application of the agency principles suggested by the Supreme Court in *Meritor*. The Tenth Circuit said:

> We find guidance in the Restatement (Second) of Agency § 219 (1958). Under § 219(1), an employer is liable for any tort committed by an employee "while acting in the scope of . . . employment." *Id.* However, as one commentator noted, 'a sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business.' Thus, 'confining liability . . . to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.
>
> Although § 219(1) . . . provides scant assistance in assessing employer liability under Title VII, § 219(2) is more helpful. In particular, § 219(2) creates employer liability when (1) the master was negligent or reckless, and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on

> apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Hicks, 833 F.2d at 1418 (citations omitted). With those principles in mind, the Tenth Circuit remanded, noting that "Gates might be liable for the acts of sexual harassment of Gleason." *Id.* at 1418. (Gleason was a supervisor at Gates Rubber Company.)

13. The following factors, though not exclusive, are relevant to determining employer liability for its own conduct in allowing a hostile environment situation to occur:

> a) notice to the employer and the employer's failure to take prompt remedial action;
>
> b) the lack of any policy against sexual harassment;
>
> c) the lack of an established or effective means for employees to voice complaints of harassment without having to go through the alleged harasser;
>
> d) pervasive and long continuing harassment which would constitute constructive knowledge to the employer.

14. Unlike the quid pro quo case, a hostile work environment claim may arise from the harassing conduct of *co-employees*. Where non-supervisors are involved, the general rule is that the employer is liable only when it has actual or constructive knowledge of the harassment and fails to take immediate and appropriate remedial action. *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir.

1986); *Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984).

15. The Court concludes Marshall belongs to a protected group.

16. The Court concludes Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

17. However, the Court also concludes that although Noah was a foreman, he was not a supervisory employee within the meaning of Title VII. Thus, Nelson Electric is not automatically liable for the acts of Noah under Title VII. Rather, Nelson Electric is liable for the acts of Noah only if it knew or should have known of the harassment and failed to take appropriate remedial action.

18. The Court concludes Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986.

19. Moreover, the Court concludes that once Nelson Electric was made aware of the harassment, Nelson took proper remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah. Unlike *Baker v. Weyerhaeuser*, 903 F.2d 1342, 1347 (10th Cir. 1990), here the employer, Nelson Electric, did not engage in an "utter failure through its officers and supervisors to take action against [co-worker] Caldwell, a known sexual harasser of females." Here, Nelson did not ignore or acquiesce in the conduct of its employee Noah.

To the contrary, Nelson investigated the matter and Noah was removed.

20. The Court concludes that none of the layoffs of Marshall were due to sexual discrimination. Rather the layoffs were due solely to economic motives concerning the business turndown at Nelson Electric and the lack of work in Department 411.

21. The Court concludes Marshall was not laid off in retaliation for her complaint about harassment.

22. Marshall is not claiming in this lawsuit that her layoff from Department 411 in August, 1986, and the subsequent denials of recall to Department 411, were violations of Title VII.

23. Nelson Electric committed no acts toward Marshall which constitute sexual harassment or which created a hostile work environment, either when analyzed subjectively or objectively, in light of Marshall's own conduct and the work atmosphere in Department 411. Marshall's conduct indicates that the work environment at Nelson Electric was not offensive or unwelcome to her.

24. Nelson Electric is not responsible or liable under Title VII for the improper conduct of Noah. Nelson Electric was not negligent or reckless in handling Marshall's complaints, and Marshall has not proven that Noah, in engaging in the offensive conduct, purported to speak or act on behalf of Nelson Electric, relied upon apparent authority from Nelson Electric, or that his offensive conduct was aided by the existence of an agency relationship with Nelson Electric.

25. Marshall has not satisfied her burden of proving that a discriminatory motive played a part in her layoff on July 2, 1987.

26. Nelson Electric established a proper non-discriminatory economic motive for laying Marshall off in August, 1986 and June, 1987. Marshall has not satisfied her burden of showing that such motive was mere pretext for discrimination.

27. Marshall was laid off pursuant ot [sic] the terms of the valid and binding collective bargaining agreement in effect at Nelson Electric.

28. The Arbitrator's decision rendered as a result of Marshall's grievances is entitled to substantial weight.

X. BILL OF COSTS

Marshall filed a bill of costs to which defendants objected. In light of this Order, Marshall's bill of costs is DENIED and defendants' objections are deemed MOOT.

XI. ATTORNEY'S FEES

Title 42 U.S.C. § 2000e-5(k) grants the Court discretion to award attorney's fees to the prevailing party in a Title VII action and the Supreme Court has clearly defined the standard for making such an award to a prevailing defendant. A defendant is entitled to recover attorney's fees in a Title VII action only if the Court makes a finding that the action was brought in bad faith or was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978);

EEOC v. St. Louis-San Francisco R.R., 743 F.2d. 739, 744 (10th Cir. 1984).

In the instant case, the Court is not able to make such findings. The issues were both novel and complex and there were numerous close legal and factual questions. Indeed, the statute of limitations question was sufficiently close that the Court took the matter under advisement.

While counsel for both sides were contentious at times and the case was hard fought by both sides, the Court finds Marshall's Title VII action was not brought in bad faith and cannot be characterized as frivolous, unreasonable or without foundation.

Accordingly, defendants are not entitled to recover their attorney fees as the prevailing party in this matter.

XII. JUDGMENT

A judgment in favor of defendants accompanies this Order, and is filed separately. The Court's previous partial judgment entered on October 29, 1990, in favor of Marshall on the intentional infliction of emotional distress claim is now withdrawn. The accompanying judgment represents the final judgment of this Court in this matter.

IT IS SO ORDERED THIS 21st DAY OF JUNE 1991.

/s/ Layn R. Phillips
LAYN R. PHILLIPS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH S. MARSHALL, Plaintiff,	)	No. 88-C-1213-P
v.	)	
NELSON ELECTRIC, a Unit of General Signal, et al., Defendants.	)	

JUDGMENT

(Filed June 21, 1991)

In accordance with the Court's order granting defendants' motions for judgment notwithstanding the verdict on plaintiff's intentional infliction of emotional distress claim, together with findings of fact and conclusions of law on plaintiff's Title VII non-jury claim, entered this same date, the Court hereby enters JUDGMENT in favor of defendants Luther Noah and Nelson Electric and against plaintiff Deborah S. Marshall on plaintiff's claim of intentional infliction of emotional distress, and JUDGMENT in favor of defendant Nelson Electric and against plaintiff Deborah S. Marshall on plaintiff's Title VII claim.

DATED THIS 21st DAY OF JUNE 1991.

/s/ Layn R. Phillips
LAYN R. PHILLIPS
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 28 1993
OFFICE OF THE CLERK

No. 93-662

(2)

In The

Supreme Court of the United States

October Term, 1993

DEBORAH S. MARSHALL,

Petitioner,

v.

NELSON ELECTRIC, a unit of General Signal, and LUTHER NOAH,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

*Michael J. Gibbens
Crowe & Dunlevy
321 South Boston
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800

Attorneys for Respondent, Nelson Electric

*Counsel of Record

*William E. Hughes
320 South Boston
Suite 1020
Tulsa, Oklahoma 74103
(918) 587-1400

Attorney for Respondent, Luther Noah

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I.

STATEMENT OF THE CASE

Proceedings in the Courts Below

This Court is in effect being asked to review the Order and Judgment of the District Court for the Northern District of Oklahoma, dated June 21, 1991. Although Petitioner technically seeks certiorari from the Tenth Circuit's Order and Judgment, rendered June 29, 1993, the Court of Appeals did nothing more than summarily affirm the District Court's rulings. In its unpublished and nonprecedential opinion,[1] the Tenth Circuit said without much ado:

> . . . We have carefully reviewed the appendices which the parties have submitted. We have also conducted an exhaustive review of the pertinent authorities. We conclude that the district court's disposition was correct, and we therefore affirm for substantially the reasons set forth in that court's lengthy and well-reasoned opinion. In light of this disposition, we need not reach the issues raised in the cross-appeal.[2]
>
> The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

This brief opinion offers no reason to grant certiorari. Accordingly, Petitioner is forced to ask this Court to perform the same task performed by the Court of Appeals; Petitioner wants this Court to review the decision of the District Court.

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[1] The Tenth Circuit specifically stated that its Order and Judgment has "no precedential value."

[2] On its cross-appeal, Nelson Electric argued that there were alternative grounds for upholding the District Court's denial of the Title VII claim, specifically that Petitioner did not timely commence her administrative proceeding and that Noah's conduct did not violate Title VII.

Petitioner's first two arguments are addressed to the District Court's findings of fact and conclusions of law regarding Petitioner's Title VII hostile environment claim against Nelson Electric.[3] Significantly, the trial court rejected much of Petitioner's testimony, finding unworthy of belief the particularly egregious conduct in which the Petitioner alleged Noah engaged. Nevertheless, the District Court found that Noah had harassed Petitioner, and concluded, contrary to Petitioner's assertion in her Petition, that she **was** "subject to unwarranted sexual harassment by Noah . . . ". (See Appendix IV to Petitioner's Petition at p. 55A). The District Court held, however, that the employer, Nelson Electric, was not liable for such sexual harassment, specifically relying on agency principles as required by this Court's opinion of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

The District Court also rejected Petitioner's claim for retaliatory layoff, finding that Petitioner had not satisfied her burden of proving discriminatory motive; that Nelson Electric had established a proper non-discriminatory economic motive; that Petitioner had failed to show that such motive was pretextual; and that Petitioner was laid off pursuant to the terms of the valid and binding collective bargaining agreement in effect at Nelson Electric. Petitioner challenges none of these findings in her Petition.

As to Petitioner's state law tort claim for intentional infliction of emotional distress, the District Court, in granting Nelson Electric and Noah's motions for judgment n.o.v., held that the tort claim was barred by the

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[3] Prior to trial, the District Court granted summary judgment in favor of Noah on Petitioner's Title VII claim. Petitioner does not seek certiorari regarding this ruling.

statute of limitations of the State of Oklahoma. The District Court's limitations analysis is unchallenged by Petitioner in this Court.

Likewise, Petitioner does not challenge the portion of the District Court's Order which granted Nelson Electric's conditional motion for new trial on Petitioner's state law tort claim. The District Court based its ruling on the "drastically differing amounts of compensatory damages" rendered against Noah and Nelson Electric. (P. App. at 37A).[4] The jury had awarded $93,000 in compensatory damages against Nelson Electric, but awarded only $2,500 against Noah, even though Noah had been the only Nelson Electric employee arguably to commit outrageous acts. The District Court concluded that the varying awards were "irreconcilably inconsistent and against the great weight of the evidence." The District Court expressed the belief that the differing awards arose out of confusing jury instructions, and that the jury improperly "attempted to apportion damages between the individual defendant and the *deep-pocket* corporate defendant." (P. App. at 37A) (emphasis added).

II.

FACTS

The "Facts" section of the Petition can at best be described as a slanted view of the evidence presented at trial. Because this view was rejected by the District Court, however, Petitioner's efforts in this regard are improper. Petitioner knows, or at least should know, that this Court

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[4] Reference to "P. App." is to District Court Order dated June 21, 1991, and to the copy of the opinion appended to the Petition filed in this Court.

will not grant certiorari "to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175, 178 (1938). As Justice Holmes wrote, "We do not grant a certiorari to review specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

Given this standard of review, an appropriate view of the facts is as follows:

A. The Evidence Supports the District Court's Finding that Petitioner was a Leader in the Sexually Charged Atmosphere.

Petitioner describes herself in her Petition as an unwilling victim of Noah's conduct. The trial court found, however, that she "was a leading participant, if not the leader, in the sexually charged environment." (P. App. at 44A). A co-worker, who had been laid off by Nelson Electric before trial, testified that Petitioner was "one of the leaders" in the sexual talk, that Petitioner asked other employees, including Noah, "whether they had sex the night before," and told them "about the sex she was having." Petitioner described sexual encounters she had with her husband, friends and a co-worker. She told co-workers that she had sex with another man while her husband watched. Petitioner and other women jokingly used a yardstick pretending to measure the size of the penises of their male co-workers. A second female co-worker testified that Petitioner talked "about the various love making abilities of her lovers", including "who had the bigger genitals and who had the smaller genitals." According to this witness, all of the employees (including Petitioner) told sexual jokes, and Noah was around when Petitioner talked about her "boyfriend Larry." (Aplee

App. at 28, 30-33).[5] A third female co-worker testified that she had brought magazines showing male nudes and a Chippendales (male dancers) calendar. She also said that the sexual talk was not an ev ry day occurrence, but she admitted, however, that these discussions would occur from time to time and that Petitioner would sometimes lead the discussion. On occasion, Petitioner told co-workers about her sexual adventures in a house she was cleaning, including a description of the different rooms in which she had sex. This co-worker described Petitioner as a "tease." (Aplee App. at 147, 150-152, 154).

While Petitioner testified that Noah listened in on the women's conversations, asking them personal questions, her co-workers testified that it was the female employees who talked about sex in front of Noah, saying that Noah "would be included. The fellow was sitting right there. He really had no choice." One female co-worker testified that Noah occasionally told them "not to talk about these kinds of things." According to another co-worker, Noah only talked about his sex life "when he was asked." (Aplee App. at 39-43, 151-152, 155).

Petitioner testified that she (and other women) used the fire stop putty[6] to model a male sex organ on only *one* occasion, claiming that she only made *one* to embarrass Noah into stopping similar use of the putty. (Aplee App. at 13-14). Her female co-workers uniformly disagreed. One of them testified that while she did not see Noah make any of the clay penises, all of the girls made them, Petitioner made "more" of them than anyone else, and

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[5] References to "Aplee App." are made to the Joint Appendix filed by Nelson Electric and Noah with the briefs in chief in the United States Court of Appeals for the Tenth Circuit. The Joint Appendix was filed on July 23, 1992.

[6] The putty is a fire resistant material used to prevent fires from spreading through electrical switches. (Aplee App. at 148).

Petitioner and the others would "giggle" about them. Another testified that Petitioner would "show them to people and laugh about it." A third testified that all of the girls made them and that Petitioner could have made as many as ten of them. Supervisor Bell, who had been laid off before trial after 28 years at Nelson, testified that Petitioner showed off, laughed and joked about her phallic art work. (Aplee App. at 29-30, 44, 106, 149-150).

Such "sex-play" occurred only occasionally. Petitioner, however, was the catalyst, as it stopped altogether when she left the department. (Aplee App. at 139).

B. The Evidence Supports the District Court's Finding that Noah did not Commit the Egregious Acts of Harassment Claimed by Petitioner.

Petitioner says that Noah played with the clay sex objects, but none of her co-workers saw this. Similarly, Petitioner testified that Noah dropped his pants, but her co-workers testified that it was the women who accidently "tugged" on them too hard. Two of these same co-workers disputed Petitioner's claim that Noah "grabbed" at the women, "touched" the women in a sexual manner, much less touched Petitioner's private areas. (Aplee App. at 33-34, 37, 38, 44, 146).

Noah also denied the misconduct alleged by Petitioner, including Petitioner's claim that Noah pressured her to have sex, and that Noah thereafter retaliated by laying her off. (Aplee App. at 47, 49, 50, 133-136, 139-143). Those who frequented Petitioner's work area never observed harassment by him. (Aplee App. at 47, 50, 53-54, 100, 109-110, 133, 156-157, 165). The trial court found "unworthy of belief" Noah's alleged propositioning and other egregious acts of harassment. (P. App. at 44A).

C. The Evidence Supports the District Court's Finding Regarding the Responsiveness of the Union Steward.

Substantial evidence supports the trial court's findings regarding the responsive actions of the union steward, evidence which was ignored in the Petition. Union steward John Fitzgerald received a complaint from Petitioner on June 30, 1986 about "dirty talk" in the shop. Although this was the only time that Petitioner complained to Fitzgerald about anything arguably related to sexual harassment, Petitioner had complained to Fitzgerald about many other things. She complained about her friend *not* receiving extra wages, over her skin being infected, and even over not being able to wear tennis shoes to work. In fact, Petitioner was one of the steward's biggest complainers. As union steward, however, his job was to represent the interest of all employees and to file grievances for them even if he thought they were invalid. As to Petitioner, he filed grievances even though he knew they were not winnable. (Aplee App. at 61-65, 70-72, 76A; and Def. Exhs. 12 and 13, Aplee App. at 252-262).

On June 30, 1986, when the steward heard Petitioner complain about "dirty talk," she made no mention of the details she later claimed characterized Noah's conduct such as asking for sex. The steward immediately had a discussion with Petitioner and Noah. Both said the other had engaged in dirty talk, and the steward concluded both were guilty of "saying things they shouldn't be saying at the plant." In fact, the steward had previously heard Petitioner use this type of dirty language – she once told a group of male employees that "Charlie [her husband] tried to fuck me to death last night but he

wasn't man enough to do it."[7] She asked another male employee to "hunch" on her because she was "horny." (Aplee App. at 59-60, 72-73, 76, 137-138).

The steward told both Petitioner and Noah to stop using inappropriate language, and told Petitioner to come see him if "she had any further problems." Petitioner never again complained to the steward about dirty talk or sexual harassment. (Aplee App. at 66, 73-74).

After scolding Noah and Petitioner, the steward went to see Bill Coleman, Nelson's human relations manager. He told Mr. Coleman that he "had the problem under control" and would advise him if he needed any assistance. Thereafter *the steward checked with Petitioner to see if there was any further problem, and Mr. Coleman was in Petitioner's work area approximately 8-15 times a week. Neither received any complaints from Petitioner about sexual harassment.* (Aplee App. at 74, 67-69, 82-83, 95).

After Petitioner was laid off on August 16, 1986, she "bumped" or transferred into another job in another department. Curiously, rather than relieved to be away from Noah's alleged harassment, however, she then often visited Noah's department and went to extraordinary lengths to be transferred back there (Aplee App. at 10, 15). She filed a union grievance on September 18, 1986. (Pl. Ex. 33; Aplt App. at 545).[8] Petitioner's grievance stated that she wanted to transfer back to her old department, making no mention of the alleged sexual harassment. Petitioner claims that she failed to mention the harassment because the union steward told her she could not file a grievance for harassment. The steward testified

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[7] Petitioner's husband, Charles Marshall, worked at Nelson at the time.

[8] References to "Aplt App." are to the Appendix filed by Petitioner with brief in chief to the court of appeals.

otherwise, stating that he "never" told her (or anyone else) she could not file a grievance for sexual harassment, and that Petitioner made no complaint to him about sexual harassment when she filed the grievance. (Aplee App. at 75). In fact, the collective bargaining agreement prohibited discrimination based on sex, and stated that grievances could be filed for sexual harassment. (Art. II of Petitioner's Exh. 58, Aplee App. at 579; Aplee App. at 52).

D. The Evidence Supports the District Court's Finding that Nelson Electric Promptly Responded to Petitioner's Complaints.

Substantial evidence supports the trial court's findings regarding the responsiveness of Nelson's management.[9] A week after denial of Petitioner's grievance requesting Petitioner's return to Noah's department, Petitioner wrote to Nelson's President alleging sexual harassment.[10] This was the first notice of any claim of sexual harassment to Nelson, other than the union steward's mention of "dirty talk" which the steward told Nelson management he had under control. Immediately after the

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[9] Petitioner's statement that Nelson had no policy against sexual harassment is untrue. The District Court specifically found that Nelson "had a policy against sexual harassment", and "had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser." (P. App. 47A). The finding is supported by the record.

[10] There was substantial evidence that Petitioner's letter to the President was really prepared to obtain her return to Noah's department. Petitioner told a co-worker that she was submitting the letter because of her layoff, and later said she would drop all the sexual harassment allegations if they would just give her old job back to her. (Aplee App. at 55-56, 58).

letter was received, human relations manager Bill Coleman commenced his investigation. Coleman took statements from many individuals, completed his investigation in *ten days*, and concluded that Noah, while not engaging in intentional harassment, had exercised poor judgment in allowing sexually oriented talk in his department. Although Coleman found that Petitioner voluntarily participated in the sexually oriented activity, Nelson determined that it would be inappropriate for Noah's employment to continue, and permitted Noah to take early retirement. Nelson reported the results of the investigation to Petitioner, who made no other complaint of sexual harassment during the remainder of her employment. (Aplee App. at 78, 88-92, 93-94, 96, 206-209, Resp. Exh. 3-6, Aplee App. at 234-251).

E. The Evidence Supports the District Court's Rejection of the Retaliatory Layoff Claim.

As the trial court found, Petitioner was laid off on July 2, 1987 solely for economic motives, not in retaliation as claimed by Petitioner. Nelson's work force dropped from 198 to 115 employees during 1986 and 1987, and the economic downturn in Petitioner's department merely reflected the continuing decrease in the overall work force at Nelson Electric during these years. (Aplt App. at 375). Additionally, Nelson's business declined from early 1986 through 1988 as a result of the recession in the petrochemical industry. Sales declined dramatically. From 1985 to 1987, sales dropped $22,000,000. As a result, Nelson had to sell product lines and lay off employees. (Aplee App.. at 110-111, 229-233, 162-166). During 1986 and 1987, because of the economic downturn, 255 layoffs occurred, involving 148 employees. In the month bracketing Petitioner's layoff, the work force dropped from 128 to 119. (Def. Exhs. 84, Aplee App. 505; 75, Aplee App.

496-497; 76, Aplee App. 498-504; 104, Aplee App. 558-567; Aplee App. at 209-217). Four employees were laid off the same day as Petitioner. (Def. Exh. 76, Aplee App. at 498-504). Pursuant to a collective bargaining agreement, layoffs were done by seniority within job classification in each department. At the time of the July 2, 1987 layoff, there were only two employees in Petitioner's Department and classification, Petitioner and a male employee. Both were laid off. (Aplt App. at 94, 723-24; Def. Exh. 78, Aplee App. at 504A-504B). Co-workers testified that the "work ran out" at the time of the layoff. (Aplee App. at 77).

F. Other Factual Errors in the Petition.

Except as to the first full paragraph on p. 8 of the Petition, the remainder of the Petition "Facts" section is fiction and is hereby challenged by Nelson Electric and Noah.

III.

ARGUMENT AND AUTHORITIES

A. Summary of Argument.

Simply put, Petitioner asks this Court to grant certiorari because she disagrees with the factual findings made by the District Court and affirmed by the Court of Appeals.

Petitioner does not argue that the Tenth Circuit opinion, or that of the District Court, is in conflict with a decision from another court of appeals. Nor does she make any other argument that any of the reasons for granting certiorari listed in Rule 10 of the Supreme Court Rules is applicable.

Moreover, the first two arguments raised by Petitioner were addressed by this Court's decision in *Meritor*

Savings Bank v. Vinson, 477 U.S. 57 (1986). Petitioner does not argue that *Meritor* was improperly decided or that the District Court did not follow its teachings.

Petitioner acknowledges that *Meritor* dealt with the first two issues of her Petition, but asks this Court to grant certiorari to "clarify" *Meritor*. Petitioner, however, does not say how *Meritor* should be clarified. She does not say what rule the Supreme Court should announce. She does not say whether the result reached by the District Court should be changed under the clarification. She does not point to any opinions from the courts of appeals which support the clarifications she has in mind.

Reading the Petition in the kindest and gentlest way, it is possible to construe the Petition as a request that this Court sit as a super-legislature and announce new requirements for Title VII claims without the foundation of a conflict between the circuit courts to provide assistance. Under this reading, certiorari is not appropriate.

A more plausible reading of the Petition is that Petitioner wants this Court to overturn the Tenth Circuit because she does not like the findings of fact made by the District Court. Petitioner acknowledges that *Meritor* dealt with the first two issues of her Petition, and appears to be asking this Court to review the facts of the case at bar. Petitioner would have this Court sit as a reviewer of the evidence, a function performed by the District Court. This is not a valid reason for the granting of certiorari. *See General Talking Pictures Corp.* and *United States v. Johnson*, both discussed at pp. 3-4, *supra*.

B. Granting Certiorari on the Issue of Petitioner's Conduct would be a Useless Gesture and would not Change the Result Reached by the Court Below.

Petitioner's first proposition asks whether conduct of a Title VII claimant is relevant in determining a hostile

environment claim. This proposition fails to support certiorari for several reasons:

1. Petitioner's assertion that a claimant's conduct is not relevant was rejected by this Court in *Meritor.*
2. Petitioner does not point to any conflict among the courts of appeals. In fact, the cases that she cites are consistent with the results reached below.
3. Petitioner does not argue that this case is distinguishable from *Meritor.*
4. The District Court followed this Court's teachings in *Meritor,* finding that some of Noah's conduct was welcomed by Petitioner, while other conduct was unwelcome.
5. The stated basis for Petitioner's proposition – her claim the District Court refused to find sexual harassment because of her conduct – is false. The District Court specifically concluded that Noah sexually harassed Petitioner, even though the District Court also found that she "welcomed" some of his conduct. In other words, Petitioner's conduct was not a factor in the result reached by the District Court – the court determined that sexual harassment had occurred despite Petitioner's conduct. Accordingly, even if this Court were to overrule *Meritor,* and rule as Petitioner suggests that a claimant's conduct is irrelevant in determining whether the supposed harassment was welcome, the result in this case would be unchanged. The District Court would still find that sexual harassment had occurred.

Any of these reasons is sufficient to deny certiorari. The District Court made very specific findings and conclusions regarding the conduct of Noah. It concluded Petitioner "was subject to unwarranted sexual harassment by Noah between 1985 and August 12, 1986." (P.

App. at 55A). Contrary to Petitioner's assertion, the District Court did not use her conduct to determine "that the sexual harassment was not a condition of petitioner's employment because of her participation in group activity . . . " (Petition at p. 11); the District Court never made such a statement. Instead, it concluded that Nelson Electric was not liable for Noah's improper conduct because Noah was not Nelson Electric's agent. In making this ruling, the District Court relied on the agency analysis announced by this Court in *Meritor.* (P. App. at 56A). *See* discussion *infra,* at pp. 18-19.

The District Court also rejected some, but not all, of the claims of harassment alleged by Petitioner. The court found that her testimony was "exaggerated" and referred to the "tattered remains" of her credibility. (P. App. at 42A) The District Court specifically rejected her testimony regarding Noah's supposed proposition and later retaliatory layoff of her, saying her testimony was "unworthy of belief." (P. App. at 44A)

The District Court also found that Petitioner "welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions "she asked Noah to leave her alone." (P. App. at 43A) The District Court, however, did not use this finding to deny Petitioner's hostile environment claim. In spite of this finding, the District Court concluded that Noah's acts constituted sexual harassment, but went on to find that the actions were not binding on Nelson Electric. (P. App. at 55A-56A).

These findings provide no grounds for this Court to grant certiorari. This present case falls under the rule announced in *Meritor* that a claimant's sexually provocative actions are relevant in determining whether she found specific sexual advances unwelcome. This Court said (477 U.S. at 68-69):

> Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," . . . which the District Court apparently admitted into evidence, "had no place in this litigation." . . . The apparent ground for this conclusion was that respondent's voluntariness vel non in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such claim, *it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.* (Emphasis added).

In the case at bar, Petitioner was the leader of the sexually provocative activity. She not only participated in it, the District Court also found that she "was a leading participant, if not the leader . . . " (P. App. at 44A).

Petitioner argues that her conduct is not relevant to the welcomeness issue, claiming that she only talked about sexual things with her female co-workers. This argument, however, was rejected by the District Court and is unsupported by the record. Petitioner talked about her sexual partners and sex acts in front of Noah, proudly showed her phallic artwork to Noah and other male co-workers, and jokingly used a ruler to measure genitals of her male co-workers. Furthermore, this evidence was just the tip of the iceberg; any effort by Petitioner to argue that she only engaged in "girl talk" is not supported by the record.

Petitioner then says that her conduct should not be viewed as welcoming Noah's alleged request for sex. The District Court, however, rejected her testimony and found that there had been no request for sex. (P. App. at 44A). Thus, for purposes of review, there was no sexual solicitation by Noah.

More importantly, the District Court recognized the distinction described by Petitioner – that her participation in sexually-charged activity did not mean that she welcomed all of Noah's conduct. The District Court found (P. App. at 43A, 47A, 55A):

> Marshall [Petitioner] welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions she asked Noah to leave her alone.
>
> * * *
>
> The Court finds Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.
>
> * * *
>
> The Court concludes Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

Further, neither of the decisions cited by Petitioner is inconsistent with the District Court Order or with *Meritor*. In *Wyerick v. Bayon Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989), the court reversed a summary judgment and required the trial court to determine whether the claimant's "three sexual comments" established that the complained-of conduct was welcome. In *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987), the court held that the "past conduct" of the plaintiff which was unknown to the harasser could not be used to conclude that she welcomed the harasser's conduct. The Fourth Circuit specifically distinguished its case from *Meritor*, where the claimant's conduct occurred in the presence of the supervisor. *Id.*

All of these standards are consistent with the result reached by the District Court. A trial was held and evidence of Petitioner's conduct was received and analyzed under the *Meritor* standard. Much of the conduct was in the presence of Noah. Finally, the District Court found

that Petitioner welcomed some of Noah's conduct, but found other actions unwelcome. Thus, the reasoning of *Swentek* and *Wyerick* is fully consistent with the District Court Order and supports the result reached below.

The decision of the District Court is also consistent with the Supreme Court's recent decision in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 1993 WL 453611 (U.S. 11/9/93), wherein the Court reaffirmed the rule:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at *all the circumstances.* (Emphasis added).

Any rule which would restrict the type of evidence to be considered would not be workable. The fact finder must be permitted to look at all of the circumstances. The District Court did so here, determining that some of the conduct was welcome, and some was not.

In summary, Petitioner offers no reason to grant certiorari.

C. Petitioner Offers No Authority or Reason to Grant Certiorari on the Issue of Employer Liability.

Certiorari should not be granted on Petitioner's second proposition for the following reasons:

1. Contrary to Petitioner's assertion, no conflict exists among the circuits on the issue of employer liability for actions of supervisors;
2. Petitioner cites no authority that is inconsistent with the findings or conclusions of the District Court;
3. All of Petitioner's citations are factually distinguishable, because they deal with employer liability where the harasser is a "supervisor." Here the District Court specifically found that Noah was not a supervisor;

4. Even if Noah had been a supervisor, application of the standards of employer liability contained within the decisions relied upon by Petitioner would not change the result in the case at bar. The District Court applied each of these tests, resolving all issues against a finding of employer liability.

With regard to employer liability the District Court found (P. App. at 47A, 56A):

(i) Noah "was not a supervisory employee within the meaning of Title VII."

(ii) "Moreover, Noah was not acting within the scope of his authority as a foreman at Nelson Electric when he sexually harassed Marshall."

(iii) "Nelson Electric had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser and had a policy against sexual harassment."

(iv) "The Court finds Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986."

(v) "Moreover, the Court finds that once Nelson Electric was made aware of the harassment, Nelson took prompt remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah."

(vi) "To the contrary, Nelson investigated the matter and Noah was removed."

(vii) "Nelson Electric is not responsible or liable under Title VII for the improper conduct of Noah. Nelson

> Electric was not negligent or reckless in handling Marshall's complaints, and Marshall has not proven that Noah, in engaging in the offensive conduct, purported to speak or act on behalf of Nelson Electric, relied upon apparent authority from Nelson Electric, or that his offensive conduct was aided by the existence of an agency relationship with Nelson Electric."

Petitioner, ignoring these findings and conclusions, attempts to draw a conflict between the Eleventh Circuit decision in *Sparks v. Pilot Freight Carriers*, 830 F.2d 1554 (11th Cir. 1987), and the Tenth Circuit's opinion of *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987). Each of these cases, however, concerns employer liability for harassment by supervisors. *Hicks*, 833 F.2d at 1416, 1418; *Sparks*, 830 F.2d at 1557, 1560. These cases have no bearing on the present case, as the District Court found that Noah was not a supervisor.[11] Although Title VII liability may exist for non-supervisory employees, the distinction is significant as supervisors and agents are more likely to create employer liability than are non-supervisors. *See generally* EEOC Guidelines, 29 C.F.R. § 1604.11(c) and (d).

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[11] Petitioner, appropriately, does not ask this Court to review the District Court's finding that Noah was not a supervisory employee. This was the function of the Tenth Circuit, and is not an appropriate ground for the granting of certiorari. *See General Talking Pictures Corp.* and *United States v. Johnson*, discussed on pp. 3-4, *supra*. In any event, the record supports the District Court's finding. John Bell, Noah's supervisor, testified that Noah lacked the authority to hire, fire or lay off employees (Aplee App. at 101-102). Contrary testimony referred to by Petitioner was rejected by the District Court.

Further, even had Noah been found to be a supervisor, there is no conflict between *Sparks* and *Hicks*, and more importantly no conflict between either of them and the District Court Order. Both the *Hicks* and *Sparks* courts primarily looked to § 219(2) of the Restatement (Second) of Agency[12] to determine employer liability. Each court, using § 219(2)(d), looked to whether the supervisor purported to act or speak on behalf of the principal, whether there was reliance on apparent authority, and whether the supervisor was aided in accomplishing the tort by the existence of the agency relationship. The Tenth Circuit, applying an **alternative** test for liability under § 219(2)(b), also looked to whether the employer had been negligent or reckless. *Hicks*, 833 F.2d at 1418. The District Court applied all of these tests and resolved them against the Petitioner. (P. App. at 56A and pp. 18-19, *supra*).[13]

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[12] Section 219 of the Restatement (Second) of Agency states:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

[13] Similarly, there is no conflict between the decision below and the other cases relied on by Petitioner. In *Shrout v. Black Clawson Co.*, 689 F.Supp. 774, 779, 781, the harasser was the claimant's supervisor, and upper management knew or

These appear to be the tests which Petitioner wants this Court to adopt. Yet, Petitioner fails to tell this Court that the District Court already applied them.

D. The Doctrine of Law of the Case is Well-Settled Law and Inapplicable to the Proceeding Below.

Petitioner's law-of-the-case contention provides no basis for the granting of certiorari, because:

1. The doctrine is well-settled, there being no split in the circuits justifying the grant of certiorari;
2. The doctrine is inapplicable to the proceedings below; and
3. Petitioner offers no cases supporting her position.

It is well-settled that the denial of a motion for summary judgment does not preclude the granting of a judgment n.o.v. In fact, Petitioner's argument was rejected in *Sandoval v. United States Smelting, Refining & Mining Co.*, 544 F.2d 463, 464 (10th Cir. 1976):

> Appellant here contends the trial court erred by granting a directed verdict when it had earlier denied appellee's motion for summary judgment. She argues that since evidence garnered at

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reasonably should have known of the harassment but failed to remedy the problem. None of these circumstances exists in the case at bar.

Petitioner improperly cites *Howard University v. Best*, 484 A.2d 958 (D.C. App. 1984). The portion of the opinion referenced by Petitioner refers not to Title VII, but to the tort of intentional infliction of emotional distress. The case was also factually distinguishable, involving a supervisory employee.

Petitioner's citation to Justice Marshall's concurring opinion in *Meritor* is also misplaced. Justice Marshall's view that employers were automatically liable for the acts of their supervisors was rejected by a majority of the Court. *Compare* 477 U.S. 76-78 *with* 477 U.S. at 72.

> the discovery stage was virtually identical to that introduced at trial, the court's directed verdict, when summary judgment was previously denied, was improper. However, a denial of summary judgment does not rule out the possibility of a directed verdict. (citations omitted)

Accord, The Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1502 (10th Cir. 1983). Moreover, Rule 54(b), Fed.R.Civ.P., provides that all orders of a trial court are "subject to revision at any time before the entry of judgment."

These Tenth Circuit decisions comport with the rulings of the Supreme Court that a trial judge retains at all times the power to re-examine and if necessary alter a previous ruling in order to avoid perpetuation of error. *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950), and *Messenger v. Anderson*, 225 U.S. 436 (1912).

The other cases cited by Petitioner do not contain a different rule. Petitioner cites *United States v. Horton*, 622 F.2d 144 (1st Cir. 1980), for the proposition that ***granting*** of a summary judgment becomes law of the case, but fails to note that the *Horton* court held the ***denial*** of a summary judgment motion decides nothing (*id.* at 148):

> It is commonly held "where the order of the court is a mere denial of the motion for summary judgment and the court does not specify what facts are uncontroverted, the order establishes nothing as the facts and all issues made by the pleadings are open at trial." (citing 6 J. Moore's Federal Practice § 56.04[1] (1975)).

Petitioner similarly cites *Eastern Tunneling Corp. v. Southgate Sanitation District*, 487 F.Supp. 109, 116-118 (D. Colo. 1979), but there the district court, despite saying that its earlier decision denying summary judgment was law of the case, reconsidered its ruling based on additional evidence and granted a partial summary judgment. These two cases, which were the only two cases cited by

Petitioner expressly dealing with summary judgment, do not support Petitioner's claims. Simply put, Petitioner offers no case which would hold that a summary judgment denial precludes the later grant of a judgment n.o.v.

Moreover, even the cases cited by Petitioner recognize that the law of the case doctrine is inapplicable where new evidence is available. *See, e.g., Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982). New evidence was certainly available in the case at bar. The rulings denying summary judgment were made early in the case. Without adopting an explicit rule of law, the Magistrate clearly indicated that his report and recommendation were based on his review of **affidavits**. The District Court accepted the report and recommendation and found that issues of fact precluded summary judgment. (Aplt App. at 54, 58). By contrast, the trial took place more than one (1) year later. After the seven (7) day trial, the District Court determined that there were no issues of fact – that no outrageous conduct had occurred within the limitations period.

Petitioner's contention that no new evidence was offered is not only inconsistent with the record below, it is implausible on its face. The denial of Petitioner's summary judgment motion decided nothing more than that there might be a triable issue based on the affidavits, whereas the issue at trial was whether the evidence was sufficient to submit the claim to the jury. After hearing all of the evidence, the District Court in the present case concluded that there was no triable issue. This ruling was affirmed by the Tenth Circuit.

In summary, the law-of-the-case doctrine is inapplicable here. Under settled law, the denial of a summary judgment does not preclude the granting of a directed verdict or judgment n.o.v. Accordingly, there is no reason to grant certiorari.

E. The Trial Court was not Required to Follow the Jury's Factual Findings when Ruling on Petitioner's Title VII Claim.

Petitioner's brief offers no reason for the Supreme Court to grant certiorari to review the District Court's decision not to follow the jury's factual findings. To the contrary, certiorari should be denied for the following reasons:

1. Petitioner cites no court of appeals decision inconsistent with the District Court's decision;
2. The jury verdict was not binding because the essential elements of a Title VII claim and state-law claim for intentional infliction are different;
3. The jury verdict was not binding because it was infirm;
4. Because the proposition urged by Petitioner involves state common law, any decision by this Court would be limited to the law of one state, and could be later undercut by changes to Oklahoma law; and
5. Because of the passage of Civil Rights Act of 1991 permitting jury trials in all Title VII cases, this issue will not arise in the future.

The issue raised by Petitioner is a relic of a bygone age. Since the passage of the Civil Rights Act of 1991, all Title VII plaintiffs are entitled to a jury trial,[14] and surely would request one in every case in which they would likewise request a jury trial on a claim for intentional infliction of emotional distress. As a consequence, review of the issue would likely have scant effect on future Title VII litigation. For this reason alone, certiorari should be

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[14] *See* 42 U.S.C.A. § 1981.

denied on this issue. This Court's time is too valuable to decide issues which would be applicable only to a very few cases.

Further, the District Court correctly decided that the jury verdict was not binding in its adjudication of the Title VII claims for two reasons that are well recognized by the circuit courts – the essential elements of a Title VII claim differ from those of Petitioner's state law claim, and the jury verdict was infirm and a nullity. Petitioner cites no case rejecting the application of either reason.[15]

1. The Essential Elements Were Different.

The District Court correctly noted, and Petitioner recognizes, that the jury findings would not be binding if the elements of the emotional distress claim were different than the elements of the Title VII claim. The Tenth Circuit has addressed whether the "essential elements" of the two claims are identical in *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990), where the court said:

> Weyerhaeuser argues that the district court's finding in the Title VII action did not have to be in accord with the district court's understanding of the general verdict returned by the jury since the essential elements of the Title VII claim were not the same as the essential elements in the present claim. Be that as it may, we do not regard the district judge's comment to indicate

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[15] Two of Petitioner's cases do not deal with the application of either reason, instead stating general principles regarding the effect of jury findings on contemporaneously tried equitable issues. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988); and *Miller v. Fairchild Industries, Inc.*, 855 F.2d 498, 507 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056. Petitioner's third case does not even deal with the applicability of jury verdicts to equitable claims, but instead with inconsistent special verdicts. *See Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991).

that he was "bound" to follow his understanding of the jury's verdict.

Petitioner also refers to two cases where the courts found respectively that a Section 1983 claim and a Section 1981 **disparate impact** claim had elements different from Title VII, such that the jury verdicts were not binding on contemporaneously tried Title VII claims. *See Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1013-14 (6th Cir. 1987); *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 935, n. 6 (11th Cir. 1983), *cert. denied* 464 U.S. 826.

Petitioner, however, cites no authority holding that the essential elements of Title VII and intentional infliction of emotional distress are identical. Without such authority, it makes little sense for this Court to grant certiorari. This is particularly so when the question turns on the interpretation of state law, here Oklahoma common law, defining the tort of intentional infliction of emotional distress. *See Eddy v. Brown*, 715 P.2d 74 (Okla. 1986). As this Court is aware, it is not the final arbitrator of Oklahoma law, and any decision it might make could be undercut by later decisions of Oklahoma courts, and in any event would have applicability only to cases governed by Oklahoma law or similar laws of other states.

In any event, important distinctions exist between the essential elements of Petitioner's emotional distress claims and her Title VII claims. For example, the elements of respondeat superior under Oklahoma law differ from agency principles used under Title VII. *Compare Hill v. McQueen*, 230 P.2d 483 (Okla. 1951), and *Dill v. Rader*, 533 P.2d 650 (Okla. App. 1975), *with Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (1987). Moreover, the actions of Noah must be found to be extreme and outrageous under the state-law tort, while they must be hostile and abusive to constitute a Title VII violation. *Compare Harris v. Forklift*

Systems, Inc., ___U.S.___, 1993 WL 453611 (U.S. 11/9/93), *with Eddy v. Brown*, 715 P.2d 74 (Okla. 1986).

Therefore, the jury's verdict on the state tort claim did not involve the same factual issues as the Title VII claims, and the District Court properly determined that the jury's verdict did not bind its adjudication of Title VII claims.

2. The Jury Verdict was Infirm and a Nullity.

The District Court rightly determined that because the jury's verdict on the emotional distress claim was infirm and a nullity, it did not bind the court's adjudication of Title VII claims. Here, the verdict was infirm and a nullity, because the District Court had not only granted Nelson Electric's and Noah's motions for judgment n.o.v., but also had granted Nelson Electric's motion for new trial. Under these circumstances, the jury's verdict became merely advisory. The District Court said (P. App. 19A and 20A):

> However, if the intentional infliction of emotional distress claim should not have been submitted to the jury in the first place, the jury's findings are viewed as an academic exercise, a nullity, and nothing more than advisory. Under such circumstances, the jury's factual findings would not be binding on the Court for purposes of the Title VII claim. *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988) (trial court's conditional rulings concerning damages, in the event its ruling on the motion for jnov was reversed, were "advisory" only and were not binding); *Williams v. Slade*, 431 F.2d 605, 609 (5th Cir. 1970) (courts have refused to grant a partial new trial on liability alone where the damages issue had been resolved in a "purely academic atmosphere"); *O'Neill v. United States*, 411 F.2d 139, 146 (3rd Cir. 1969) (trial court's

> conditional assessment of damages, in the event the defendant's judgment was reversed on appeal, bore the characteristic of an "advisory opinion," was "purely academic" when made, and did not pass through the refining pressure of reality"); *Romer v. Baldwin*, 317 F.2d 919, 923 (3rd Cir. 1963) (when the jury assessed damages in favor of plaintiff despite finding no liability on the part of defendant, the jury's assessment was "merely an intellectual exercise" and not binding on remand); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); *see also Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458, n. 4 (4th Cir. 1989).

Petitioner cites no authority contrary to any of the cases relied on by the District Court. She does not argue that there is a conflict between the decision below and decisions from other circuits. Instead she tries (unsuccessfully) to distinguish the facts of the cases relied on by the District Court.

For example, Petitioner argues *Swentek* is distinguishable, saying the jury verdict in that case was set aside as against the clear weight of the evidence while in the case at bar the District Court granted judgment n.o.v. based on a statute of limitations. However, the District Court in the present case also granted a conditional new trial for the reason the jury verdict was "irreconcilably inconsistent and against the great weight of the evidence." (P. App. at 37A).[16] The same situation existed in *Swentek*, where the

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[16] The jury's answers to special interrogatories – that Nelson was outrageous because it did not have a written policy on sexual harassment, as well as its explanation of its disparate damage awards against Noah and Nelson – are two further examples of the verdict's infirmity. At best, the jury was mis-

jury verdict was found to be against the clear weight of the evidence. 830 F.2d at 552. Thus, Petitioner's efforts to distinguish the cases on which the District Court relied fail.

More importantly, Petitioner offers no reason to grant certiorari. Not only does she lack any authority which conflicts with the authorities cited by the District Court, she cannot escape the conclusion that the issue she proposes is moribund as a result of the Civil Rights Act of 1991.

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guided. At worst, the jurors ignored their oaths to decide the case based on evidence. Under these circumstances, and particularly where a new trial was granted because the jury's verdict was clearly against the weight of the evidence, to require the trial court to be bound by the jury's findings would be a travesty of justice.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CROWE & DUNLEVY
*MICHAEL J. GIBBENS, OBA #3339
500 Kennedy Building
321 South Boston
Tulsa, Oklahoma 74103
(918) 592-9800

Attorneys for Respondent, Nelson Electric

*WILLIAM E. HUGHES
320 South Boston
Suite 1020
Tulsa, Oklahoma 74103
(918) 584-1400

Attorney for Respondent, Luther Noah

*Counsel of Record